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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 693.

WILLIAM DUNBAR, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED AUGUST 16, 1894.

(15,575.)

(15,575.)

SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 5, 1894.

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1 UNITED STATES OF AMERICA, } ss:
District of Oregon, }

To the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the district of Oregon, wherein William Dunbar is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said district, this February 15th, 1894.

CHARLES B. BELLINGER, *Judge.*

[Endorsed:] Nos. 3420 & 2580. U. S. district court, district of Oregon. The United States *vs.* William Dunbar. Citation on writ of error. Filed Feb'y 15, 1894. R. B. Lamson, clerk, by —— ——, duputy.

Service of the within citation by copy is hereby this day accepted.

CHAS. J. SCHNABEL,
Ass't U. S. Attorney.

Portland, Oregon, February 15, 1894.

2 In the Supreme Court of the United States.

WILLIAM DUNBAR, Plaintiff in Error, }
vs. } No. —. Writ of Error.
THE UNITED STATES. }

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the district court of the United States for the district of Oregon, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before the Honorable Charles B. Bellinger, one of you, between The United
1893, the same being the 1034 judicial William Dunbar, de-
July term of said court—present, the Honorable Charles B. Bel-
the great damage of s district judge, presiding—the following pro-
appear, *and* we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the

same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within sixty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should to be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this Feb'y 15, 1894.

[Seal United States Circuit Court, Oregon.]

J. A. SLADEN,
Clerk of the Circuit Court of the United States
for the District of Oregon.
By R. B. LAMSON,
Deputy Clerk.

[Endorsed:] In the Supreme Court of the United States. William Dunbar, pl'ff in error, *vs.* The United States. Writ of error. Filed —— —, 188–. ——, clerk, by ——, deputy clerk.

3 In the District Court of the United States for the District of Oregon, July Term, 1893.

Be it remembered that on the 14th day of July, 1893, there was duly filed in the district court of the United States for the district of Oregon an indictment in words and figures as follows, to wit:

4 In the District Court of the United States for the District of Oregon.

THE UNITED STATES *vs.* WM. DUNBAR. } Indictment. Section 2865, R. S.

The grand jurors of the United States of America chosen, selected and sworn within and for the district of Oregon, in the name and by the authority of the United States of America, upon their oaths do find and present—

That on the 28th day of July, 1892, in the State of Oregon and in the district of Oregon and within the jurisdiction of this court, the said Wm. Dunbar did, on the steamship Haytian Republic, a steamship plying between the port of Portland, Oregon, in the United States, and Vancouver, in the province of British Columbia, Dominion of Canada,

to wit, into the State of Oregon and within the district of Oregon and within the jurisdiction of this court, and from a foreign country, to wit, the province of British Columbia, in the Dominion of Canada, certain goods, wares, and merchandise, to wit, a large quantity of prepared opium, being about 300 pounds of prepared opium, the exact number of

and provided and against the peace and dignity of the United States of America.

Dated Portland, Oregon, July 14th, 1893.

N. H. ALLEN.

said opium or any part thereof invoiced, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

Second Count.

And the grand jurors aforesaid upon their oaths aforesaid do further present—

That on the 20th day of August, 1892, in the State of Oregon and in the district of Oregon and within the jurisdiction of this court, the said Wm. Dunbar did, on the steamship Haytian Republic, a steamship plying between the port of Portland, Oregon, in the United States, and Vancouver, in the province of British Columbia, Dominion of Canada, wilfully, unlawfully, and knowingly and with intent to defraud the revenues of the United States smuggle, and clandestinely introduce into the United States, to wit, into the State of Oregon and within the district of Oregon and within the jurisdiction of this court, and from a foreign country, to wit, the province of British Columbia, in the Dominion of Canada, certain goods, wares, and merchandise, to wit, a large quantity of prepared opium, being about 800 pounds of prepared opium, the exact number of pounds being to the grand jury unknown, of the value of $8,800.00, subject to duty by law, to wit, a duty of twelve dollars ($12) per pound, and which should have been invoiced, without paying or accounting for said duty or any part thereof and without having said opium or any part thereof invoiced, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

Third Count.

[illegible] opium, [illegible]

"A true bill," which indictment is received by the court and ordered to be filed; whereupon, on motion of Mr. Daniel R. Murphy, United States attorney, it is ordered that a bench warrant issue for the arrest of said defendant with the following endorsement thereon: "The defendant is to — admitted to bail in the sum of five thousand dollars."

11 And afterwards, to wit, on Tuesday, the 31st day of October, 1893, the same being the 103d judicial day of the regular July term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

me, to the Supreme Court of the United States, together with this
it, so that you have the same at Washington within sixty days
m the date hereof, in the said Supreme Court to be then and
dirios aforesaid being then

Fourth Count.

That on the 22nd day of February, 1893, in the State of Oregon and in the district of Oregon and within the jurisdiction of this court, the said Wm. Dunbar did, on the steamship Haytian Republic, a steamship plying between the port of Portland, Oregon, in the United States, and Vancouver, in the province of British Columbia, Dominion of Canada, wilfully, unlawfully, and knowingly
7 and with intent to defraud the revenues of the United States smuggle and clandestinely introduce into the United States, to wit, into the State of Oregon and within the district of Oregon and within the jurisdiction of this court, and from a foreign country, to wit, the province of British Columbia, in the Dominion of Canada, certain goods, wares, and merchandise, to wit, a large quantity of prepared opium, being about 900 pounds of prepared opium, the exact number of pounds being to the grand jury unknown, of the value of $9,900, subject to duty by law, to wit, a duty of twelve dollars ($12.00) per pound, and which should have been invoiced, without paying or accounting for said duty or any part thereof and without having said opium or any part thereof invoiced, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

Fifth Count.

That on the 27th day of January, 1893, in the State of Oregon and in the district of Oregon and within the jurisdiction of this court, the said Wm. Dunbar did, on the steamship Haytian Republ- of Portland, Oregon, in the

The grand jurors of the United States of America, w. Oregon, in the and sworn within and for the district of Oregon, in the name and by the authority of the United States of America, upon their oaths do find and present—

That on the 28th day of July, 1892, in the State of Oregon and in the district of Oregon and within the jurisdiction of this court, the said Wm. Dunbar did, on the steamship Haytian Republic, a steamship plying between the port of Portland, Oregon, in the United States, and Vancouver, in the province of British Columbia, Dominion of Canada,

to wit, into the State
of Oregon and within the district of Oregon and within the juris-
of this court, and from a foreign country, to wit, the province
mbia, in the Dominion of Canada, certain goods,
to wit, a large quantity of prepared opium,
opium, the exact number of

and provided and against the peace and dignity of the United States of America.

Dated Portland, Oregon, July 14th, 1893.

N. H. ALLEN,
Foreman of the United States Grand Jury.
DANIEL R. MURPHY,
United States Attorney for Oregon.

Witnesses sworn and examined before the grand jury: W. B. Jackling, W. H. Brinker, J. H. Coblentz, D. A. McKenzie, J. C. Baird, E. Q. Wood, E. W. Spencer, Henry Cristensen, J. E. Weitor, Robert Garthorne, C. A. Noyes, J. L. Caples, G. E. Gard, Alexander Young, Capt. Wm. Meyers, T. J. Black, Levi W. Myers, and Wm. Dunbar, in his own behalf.

Endorsements: A true bill. N. H. Allen, foreman of the grand jury. Filed Jul- 14, 1893. R. B. Lamson, clerk.

9 And afterwards, to wit, on Friday, the 14th day of July, 1893, the same being the 10th judicial day of the regular July term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

10 In the District Court of the United States for the District of Oregon.

JULY 14, 1893.

THE UNITED STATES *vs.* WILLIAM DUNBAR. } No. 3420. Indictment. Section 2865, R. S.

Now, at this day, comes into court the grand jury and through its foreman presents to the court an indictment charging the defendant above named with the crime of smuggling opium, endorsed "A true bill," which indictment is received by the court and ordered to be filed; whereupon, on motion of Mr. Daniel R. Murphy, United States attorney, it is ordered that a bench warrant issue for the arrest of said defendant with the following endorsement thereon: "The defendant is to — admitted to bail in the sum of five thousand dollars."

11 And afterwards, to wit, on Tuesday, the 31st day of October, 1893, the same being the 103d judicial day of the regular July term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

12 In the District Court of the United States for the District of Oregon.

OCTOBER 31, 1893.

THE UNITED STATES } No. 3420. Indictment.
vs. } Section 2865, R. S.
WILLIAM DUNBAR. }

Now, at this day, comes the plaintiff, by Mr. John M. Gearin, special assistant United States attorney, and the defendant, by Mr. Alfred F. Sears, Jr., of counsel, and, on motion of said plaintiff, it is ordered that this cause be, and the same is hereby, set for trial on Tuesday, November 28, 1893.

13 And afterwards, to wit, on the 25th day of November, 1893, there was duly filed in said court an indictment, cause No. 3380, in words and figures as follows, to wit:

14 In the District Court of the United States for the District of Oregon.

THE UNITED STATES } Indictment. Section 3082, R. S.
vs. }
WILLIAM DUNBAR. }

The grand jurors of the United States of America chosen, selected, and sworn within and for the district of Oregon, in the name and by the authority of the United States of America, upon their oaths do find and present—

That on the 4th day of June, 1892, in the State of Oregon and in the district of Oregon and within the jurisdiction of this court, William Dunbar did, on the steamship Wilmington, a steamer plying between the port of Portland, Oregon, in the United States, and Vancouver and Victoria, in the province of British Columbia, Dominion of Canada, and with intent to defraud the revenues of the United States, willfully, unlawfully, knowingly, and fraudulently import, bring, smuggle, and clandestinely introduce into the United States, to wit, into the State of Oregon and within the jurisdiction of this court, and from a foreign country, to wit, the province of British Columbia and the Dominion of Canada, certain goods, wares, and merchandise, to wit, a large quantity of prepared opium, being about 365 pounds of prepared opium, the exact number of pounds being to the grand jury unknown, of the value of $3,650.00, subject to a duty by law, to wit, to a duty of ($12.00) twelve dollars per pound, and which should have been invoiced, without paying or accounting for said duty or any part thereof, and without having said prepared opium of any part thereof invoiced and without having said prepared opium or any part thereof included in the manifest of the cargo of said steamship Wilmington,

15 and without passing said prepared opium or any part thereof or the packages or any of the packages containing the same through the custom-house or submitting said prepared opium or any part thereof or the packages or any of the packages con-

taining the same to the or any of the officers of the revenues for examination, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

2nd Count.

And the grand jurors aforesaid upon their oaths aforesaid do further present—

That on the 1st day of July, 1892, in the State of Oregon and in the district of Oregon and within the jurisdiction of this court, William Dunbar did, upon the steamship Wilmington, a steamship plying between the port of Portland, Oregon, in the United States, and Vancouver and Victoria, in the province of British Columbia, Dominion of Canada, and with intent to defraud the revenues of the United States, wilfully, unlawfully, knowingly, and fraudulently import, bring, smuggle, and clandestinely introduce into the United States, to wit, into the State of Oregon and within the district of Oregon and within the jurisdiction of this court, and from a foreign country, to wit, the province of British Columbia, in the Dominion of Canada, certain goods, wares, and merchandise, to wit, a large quantity of prepared opium, being about 300 pounds of prepared opium, the exact number of pounds being to the grand jury unknown, of the value of $3,000.00, subject to a duty by law, to wit, to a duty of twelve dollars ($12.00) per pound, and which should have been invoiced, without paying or accounting for said duty or any part thereof, and without having said prepared opium or any part thereof invoiced, and without having said prepared opium or any part thereof included in the manifest of the cargo of said steamship Wilmington, and without passing said prepared opium or any part thereof or the packages or any of the packages containing
16 the same through the custom-house or submitting said prepared opium or any part thereof or the packages or any of the packages containing the same to the or any of the officers of the revenues for examination, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

3rd Count.

And the grand jurors aforesaid upon their oaths aforesaid do further present—

That on the 12th day of July, 1892, in the State of Oregon and in the district of Oregon and within the jurisdiction of this court, William Dunbar did, upon the steamship Wilmington, a steamship plying between the port of Portland, Oregon, in the United States, and Vancouver and Victoria, in the province of British Columbia, Dominion of Canada, and with intent to defraud the revenues of the United States, wilfully, unlawfully, knowingly, and fraudulently import, bring, smuggle, and clandestinely introduce into the United States, to wit, into the State of Oregon and within the district of Oregon and within the jurisdiction of this court, and from

a foreign country, to wit, the province of British Columbia, in the Dominion of Canada, certain goods, wares, and merchandise, to wit, a large quantity of prepared opium, being about 450 pounds of prepared opium, the exact number of pounds being to the grand jury unknown, of the value of $4,500.00, subject to a duty by law, to wit, to a duty of twelve dollars ($12.00) per pound, and which should have been invoiced, without paying or accounting for said duty or any part thereof, and without having said prepared opium or any part thereof invoiced, and without having said prepared opium or any part thereof included in the manifest of the cargo of said steamship Wilmington, and without passing said prepared opium or any part thereof or the packages or any of the packages containing the same through the custom-house or submitting said prepared opium or any part thereof or the
17 packages or any of the packages containing the same to the or any of the officers of the revenues for examination, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

4th Count.

And the grand jurors aforesaid upon their oaths aforesaid do further find and present—

That on the 28th day of October, 1892, in the State of Oregon and in the district of Oregon and within the jurisdiction of this court, William Dunbar did, upon the steamship Haytian Republic, a steamship plying between the port of Portland, Oregon, in the United States, and Vancouver and Victoria, in the province of British Columbia, Dominion of Canada, and with intent to defraud the revenues of the United States, wilfully, unlawfully, knowingly, and fraudulently import, bring, smuggle, and clandestinely introduce into the United States, to wit, into the State of Oregon and within the district of Oregon and within the jurisdiction of this court, and from a foreign country, to wit, the province of British Columbia, in the Dominion of Canada, certain goods, wares, and merchandise, to wit, a large quantity of prepared opium, being about 500 pounds of prepared opium, the exact number of pounds being to the grand jury unknown, of the value of $5,000.00, subject to a duty by law, to wit, to a duty of twelve dollars ($12.00) per pound, and which should have been invoiced, without paying or accounting for said duty or any part thereof, and without having said prepared — or any part thereof invoiced, and without having said prepared opium or any part thereof included in the manifest of the cargo of said steamship Haytian Republic, and without passing said prepared opium or any part thereof or the packages or any of the pack-
18 ages containing the same through the custom-house or submitting said prepared opium or any part thereof or the packages or any of the packages containing the same to the or any of the officers of the revenues for examination, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

No 613

For Main Brief of U.S. in this Case See Pt Clara vs U.S. No 1062 of October Term, 1893

(Our Copies Exhausted)

5th Count.

And the grand jurors aforesaid upon their oaths aforesaid do further present—

That on the 26th day of November, 1892, in the State of Oregon and in the district of Oregon and within the jurisdiction of this court, William Dunbar did, upon the steamship Haytian Republic, a steamship plying between the port of Portland, Oregon, in the United States, and Vancouver and Victoria, in the province of British Columbia, Dominion of Canada, and with intent to defraud the revenues of the United States, wilfully, unlawfully, knowingly, and fraudulently import, bring, smuggle, and clandestinely introduce into the United States, to wit, into the State of Oregon and within the district of Oregon and within the jurisdiction of this court, and from a foreign country, to wit, the province of British Columbia, in the Dominion of Canada, certain goods, wares, and merchandise, to wit, a large quantity of prepared opium, being about 2,090 pounds of prepared opium, the exact number of pounds being to the grand jury unknown, of the value of $20,900.00, subject to a duty by law, to wit, to a duty of twelve dollars ($12.00) per pound, and which should have been invoiced, without paying or accounting for said duty or any part thereof, and without having said prepared opium or any part thereof invoiced, and without having said prepared opium or any part thereof included in the manifest of the cargo of said steamship Haytian Republic, and without passing said
19 prepared opium or any part thereof or the packages or any of the packages containing the same through the custom-house or submitting said prepared opium or any part thereof or the packages or any of the packages containing the same to the or any of the officers of the revenues for examination, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

6th Count.

And the grand jurors aforesaid upon their oaths aforesaid do further present that on the 29th day of October, 1892, in the United States of America and in the district of Oregon and within the jurisdiction of this court, the said William Dunbar, with intent to then and there defraud the revenues of the United States, did wilfully, unlawfully, knowingly, and fraudulently conceal in the United States and in the district of Oregon and within the jurisdiction of this court, by clandestinely depositing and hiding away in the store of the Dunbar Produce & Grocery Company, of the city of Portland, Multnomah county, Oregon, of which firm William Dunbar was a member, a large quantity of prepared opium, to wit, about 820 pounds of prepared opium, the exact number of pounds being to the grand jury unknown, which opium was subject to a duty by law, to wit, to a duty of twelve dollars ($12.00) per pound, and which should have been invoiced, and which opium had been on said 29th day of October, 1892, knowingly, unlawfully, wilfully, and fraudulently smuggled, imported, brought, and clandestinely

introduced into the United States from a foreign country, to wit, from the province of British Columbia, in the Dominion of Canada, and which opium had not been invoiced and no duty whatever paid or accounted for on said opium or any part thereof, all of which facts were then and there well known to said William Dunbar, contrary to the form of statute in such cases made and provided and against the peace and dignity of the United States of America.

7th Count.

And the grand jurors aforesaid upon their oaths aforesaid do further present that on the 29th day of October, 1892, said William Dunbar, in the district of Oregon and within the jurisdiction of this court, did wilfully, unlawfully, fraudulently, and knowingly and with intent to defraud the revenues of the United States, facilitate the transportation after importation of a large quantity of prepared opium, to wit, about 820 pounds of prepared opium, the exact number of pounds being to the grand jury unknown, which prepared opium was subject to a duty by law, to wit, to a duty of twelve dollars ($12.00) per pound, and which should have been invoiced, and which prepared opium on said 29th day of October, 1892, had been knowingly, wilfully, unlawfully, and fraudulently brought, imported, smuggled, and clandestinely introduced into the United States and into the district of Oregon and within the jurisdiction of this court from a foreign country, to wit, from the province of British Columbia, Dominion of Canada, and upon which prepared opium no duty had been paid or accounted for according to law, and none of said prepared opium had been invoiced, he, the said William Dunbar, then and there well knowing that no duty had been paid or accounted for according to law on said prepared opium, and that none of said prepared opium had been invoiced, and that the same and the whole thereof had been unlawfully, wilfully, knowingly, and fraudulently brought, imported, smuggled, and clandestinely introduced into the United States and into the district of Oregon from said foreign country, said province of British Columbia, in said Dominion of Canada as aforesaid; that said William Dunbar did then and there facilitate the transportation of said opium, after importation, by enclosing the same in boxes and marking the same as "playing cards" and causing the same to be shipped from Portland, Oregon, to San Francisco, California, contrary to the statutes in such cases made and provided and against the peace and dignity of the United States.

8th Count.

And the grand jurors aforesaid upon their oaths aforesaid do further present that on the 5th day of February, 1893, in the United States of America and in the district of Oregon and within the jurisdiction of this court, the said William Dunbar, with intent to then and there defraud the revenues of the United States, did

27 In the District Court of the United States for the District of Oregon.

NOVEMBER 27, 1893.

THE UNITED STATES ...
city of Portland, Multnomah county, Oregon, [illegible] Section 2865, R. S. Dunbar was a member, a large quantity of prepared opium, to wit, about 200 pounds, the exact number of pounds being to the grand jury unknown, which opium was subject to a duty by law, to wit, to a duty of twelve dollars ($12.00) per pound, and which should have been invoiced, and which opium had been on said 5th day of February, 1893, knowingly, unlawfully, wilfully, and fraudulently smuggled, imported, brought, and clandestinely introduced into the United States from a foreign country, to wit, from the province of British Columbia, in the Dominion of Canada, and which opium had not been invoiced and no duty whatever paid or accounted for on said opium or any part thereof, all of which facts were then and there well known to said William Dunbar, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States.

22 *9th Count.*

And the grand jurors aforesaid upon their oaths aforesaid do further present that [illegible] waives arraignment upon the indictment herein, and for plea thereto says he is not guilty; whereupon, on motion of said plaintiff, it is ordered that this cause be, and the same is hereby, consolidated with cause numbered 3420, The United States against William Dunbar, for violation of section 2865 of the Revised Statutes.

29 And afterwards, to wit, on Tuesday, the 28th day of November, 1893, the same being the 20th judicial day of the regular November term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

30 In the District Court of the United States for the District of Oregon.

NOVEMBER 28, 1893.

THE UNITED STATES vs. WILLIAM DUNBAR. } No. 3420 and 3580. Indictment. Sections 2865 and 3082, R. S.

Now, at this day, comes the plaintiff, by Mr. Daniel R. Murphy, United States attorney, and Mr. John M. Gearin, Mr. George H. Durand, and Mr. Charles J. Schnabel, of counsel, and the defendant, appearing in his own proper person and by Mr. Henry E. McGinn and Mr. Alfred F. Sears, Jr., of counsel, and, this being the day set for the trial of this cause, now come the following-named jurors to try the issue joined, viz.: J. F. Johnson, Charles S. Emerson, J. W.

introduced into the United States from a foreign country, to wit, from the province of British Columbia, in the Dominion of Canada, and which opium had not been invoiced and no duty whatever paid or accounted for on said opium or any part thereof, all of which facts were then and there

GEO. W. OLDS,
Foreman of the Grand Jury.

DANIEL R. MURPHY,
U. S. District Attorney for Oregon.

Witnesses sworn and examined before the grand jury: J. L. Caples, J. E. Weitor, Wm. Grant, Wm. Gemmell, Rob't Garthorn, F. W. Patterson, E. W. Spencer, Alex Young, Henry Christensen, H. T. Berg, Mary Berg, Thomas Berg, E. E. Kellogg, Sig Baer, N. Blum, W. A. Eatchel, W. B. Jackling, L. C. Sweeney, Joseph Kelly, W. B. Johnson, and T. J. Black.

Endorsed: A true bill. Geo. W. Olds, foreman of the grand jury. Filed November 25, 1893. R. B. Lamson, clerk.

24 And afterwards, to wit, on Saturday, the 25th day of November, 1893, the same being the 18th judicial day of the regular November term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said cause, to wit:

ported, smuggled, and clandestinely introduced into the United States and into the district of Oregon and within the jurisdiction of this court from a foreign country, to wit, from the province of British Columbia, Dominion of Canada, and upon which prepared opium no duty had been paid or accounted for according to law, and none of said prepared opium had been invoiced, he, the said William Dunbar, then and there well knowing that no duty had been paid or accounted for according to law on said prepared opium, and that none of said prepared opium had been invoiced, and that the same and the whole thereof had been unlawfully, wilfully, knowingly, and fraudulently brought, imported, smuggled, and clandestinely introduced into the United States and into the district of Oregon from said foreign country, said province of British Columbia, in said Dominion of Canada as aforesaid; that said William Dunbar did then and there facilitate the transportation of said opium, after importation, by enclosing the same

21 in boxes and marking the same as "playing cards" and causing the same to be shipped from Portland, Oregon, to San Francisco, California, contrary to the statutes in such cases made and provided and against the peace and dignity of the United States.

8th Count.

And the grand jurors aforesaid upon their oaths aforesaid do further present that on the 5th day of February, 1893, in the United States of America and in the district of Oregon and within the jurisdiction of this court, the said William Dunbar, with intent

27 In the District Court of the United States for the District of Oregon.

NOVEMBER 27, 1893.

THE UNITED STATES } No. 3420. Indictment. Section 2865, R. S.
vs.
WILLIAM DUNBAR. }

Now, at this day, comes the plaintiff, by Mr. Daniel R. Murphy, United States attorney, and the defendant, appearing in his own proper person and by Mr. Alfred F. Sears, Jr., of counsel, and thereupon said defendant waives arraignment upon the indictment herein, and for plea thereto says he is not guilty.

28 In the District Court of the United States for the District of Oregon.

NOVEMBER 27, 1893.

THE UNITED STATES } No. 3580. Indictment. Section 3082, R. S.
vs.
WILLIAM DUNBAR. }

Now, at this day, comes the plaintiff, by Mr. Daniel R. Murphy, United States attorney, and the defendant, appearing in his own proper person and by Mr. Alfred F. Sears, Jr., of counsel, and thereupon said defendant waives arraignment upon the indictment herein, and for plea thereto says he is not guilty; whereupon, on motion of said plaintiff, it is ordered that this cause be, and the same is hereby, consolidated with cause numbered 3420, The United States against William Dunbar, for violation of section 2865 of the Revised Statutes.

29 And afterwards, to wit, on Tuesday, the 28th day of November, 1893, the same being the 20th judicial day of the regular November term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

30 In the District Court of the United States for the District of Oregon.

NOVEMBER 28, 1893.

THE UNITED STATES } No. 3420 and 3580. Indictment. Sections
vs. 2865 and 3082, R. S.
WILLIAM DUNBAR. }

Now, at this day, comes the plaintiff, by Mr. Daniel R. Murphy, United States attorney, and Mr. John M. Gearin, Mr. George H. Durand, and Mr. Charles J. Schnabel, of counsel, and the defendant, appearing in his own proper person and by Mr. Henry E. McGinn and Mr. Alfred F. Sears, Jr., of counsel, and, this being the day set for the trial of this cause, now come the following-named jurors to try the issue joined, viz., J. F. Johnson, Charles S. Emerson, J. W. Allen, Nathan Tingle, W. G. Flett, G. L. Baker, Lyman Herrick,

John H. Yantis, J. M. Safford, J. W. Goudy, J. M. Ferguson, and Robert W. Long, twelve good and lawful men of the district, who, being accepted by the parties and being duly empanelled and sworn, proceed to hear the evidence adduced, and, the hour of adjournment having arrived, the trial of this cause is continued until tomorrow.

31 And afterwards, to wit, on Wednesday, the 29th day of November, 1893, the same being the 21st judicial day of the regular November term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

32 In the District Court of the United States for the District of Oregon.

NOVEMBER 29, 1893.

THE UNITED STATES *vs.* WILLIAM DUNBAR. } No. 3420 and 3580. Indictment. Sections 2865 and 3082, R. S.

Now, at this day, comes the plaintiff, by its counsel as of yesterday, and the defendant, appearing in his own proper person and by his counsel as of yesterday, and, the jury empanelled herein being present and answering to their names, the trial of this cause proceeds, and, the hour of adjournment having arrived, the trial of this cause is continued until Friday, December 1, 1893.

33 And afterwards, to wit, on Friday, the 1st day of December, 1893, the same being the 23d judicial day of the regular November term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

34 In the District Court of the United States for the District of Oregon.

DECEMBER 1, 1893.

THE UNITED STATES *vs.* WILLIAM DUNBAR. } No. 3420 and 3580. Indictments. Sections 2865 and 3082, R. S.

Now, at this day, comes the plaintiff, by its counsel as of Wednesday, and the defendant, appearing in his own proper person and by his counsel as of Wednesday, and, the jury empanelled herein being present, and answering to their names, the trial of this cause proceeds, and, the hour of adjournment having arrived, the trial of this cause is continued until tomorrow.

35 And afterwards, to wit, on Saturday, the 2d day of December, 1893, the same being the 24th judicial day of the regular November term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

36 In the District Court of the United States for the District of Oregon.

DECEMBER 2, 1893.

THE UNITED STATES *vs.* WILLIAM DUNBAR. } No. 3420 and 3580. Indictments. Sections 2865 and 3082, R. S.

Now, at this day, comes the plaintiff, by its counsel as of yesterday, and the defendant, appearing in his own proper person and by his counsel as of yesterday, and, the jury empanelled herein being present and answering to their names, the trial of this cause proceeds, and the jury, having heard the evidence adduced, the arguments of counsel, and the charge of the court, retire in charge of proper sworn officers to consider of their verdict, and after being out a short time return into court the following verdict, viz: "We, the jury in the above-entitled action, find the defendant guilty as charged in the second, fourth, fifth, and ninth counts in indictment numbered 3580, and we further find the defendant guilty as charged in the third and fourth counts of indictment numbered 3420. J. M. Stafford, foreman;" which verdict is received by the court and ordered to be filed.

37 And afterwards, to wit, on the 2d day of December, 1893, there was duly filed in said court a verdict in words and figures as follows, to wit:

38 In the District Court of the United States for the District of Oregon.

THE UNITED STATES OF AMERICA *vs.* WM. DUNBAR. } No. 3420 and 3580.

We, the jury in the above-entitled action, find the defendant guilty as charged in the second, fourth, fifth, and ninth counts in indictment numbered 3580, and we further find the defendant guilty as charged in the third and fourth counts of indictment numbered 3420.

J. M. STAFFORD, *Foreman.*

Endorsed: Filed December 2, 1893. R. B. Lamson, clerk.

39 And afterwards, to wit, on Wednesday, the 6th day of December, 1893, the same being the 27th judicial day of the regular November term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

40 In the District Court of the United States for the District of Oregon.

DECEMBER 6, 1893.

THE UNITED STATES } No. 3420 and 3580. Indictments. Sec-
vs. } tions 2865 and 3082, R. S.
WILLIAM DUNBAR. }

Now, at this day, comes the plaintiff, by Mr. Daniel R. Murphy, United States attorney, and the defendant, by Mr. Henry E. McGinn, of counsel, and on motion of said defendant it is ordered that said defendant be, and he is hereby, allowed ten days from this date in which to file a motion for a new trial herein.

41 And afterwards, to wit, on Saturday, the 23d day of December, 1893, the same being the 12d judicial day of the regular November term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

42 In the District Court of the United States for the District of Oregon.

DECEMBER 23, 1893.

THE UNITED STATES } No. 3420 and 3580. Indictment.
vs. } Sections 2865 and 3082, R. S.
WILLIAM DUNBAR. }

Now, at this day, on motion of Mr. Henry E. McGinn, of counsel for the defendant, it is ordered that the time allowed said defendant in which to file a motion for a new trial herein be, and the same is hereby, extended until ten days from this date.

43 And afterwards, to wit, on the 11th day of January, 1894, there was duly filed in said court a motion for a new trial in words and figures as follows, to wit:

44 In the District Court of the United States within and for the District of Oregon.

UNITED STATES, Plaintiff, }
vs. } Motion for a New Trial.
WILLIAM DUNBAR, Defendant. }

Comes now the above-named defendant, William Dunbar, and moves the court to set aside the verdict heretofore rendered herein and for a new trial. This motion is made upon the indictment upon which the defendant was tried and the minutes taken by the duly authorized reporters of the proceedings of the said trial and is based upon the following grounds, *to wit*:

First. Insufficiency of the evidence to justify the verdict and that it is against law.

Second. Insufficiency of the indictment to justify any verdict, and in that the same contains no facts sufficient to constitute a crime.

Third. Insufficiency of each of the counts of said indictment separately considered upon which counts the defendant was convicted, except the ninth count, to justify any verdict, and in that each of the said counts separately considered, except the said ninth count, does not state facts sufficient to constitute a crime.

Fourth. Because the facts proved to support the averment of said ninth count were also proved to sustain one of the other counts of said indictment hereinbefore referred to upon which the said defendant was by said jury found guilty, and that by the action of said jury he was therefore twice found guilty for the commission of acts which can constitute but one offense.

Fifth. Errors in law occurring at the trial and duly excepted to by this defendant, as more fully appears by a reference to the said notes of the said reporter extended and in the bill of exceptions herein.

45

HENRY E. McGINN AND
ALFRED F. SEARS, JR.,
Attorneys for Defendant, William Dunbar.

Endorsed: Filed January 11, 1894. R. B. Lamson, clerk.

46 And afterwards, to wit, on the 23d day of January, 1894, there was duly filed in said court a notice in words and figures as follows, to wit:

47 In the District Court of the United States for the District of Oregon.

THE UNITED STATES, Plaintiff,
vs.
WILLIAM DUNBAR. } Motion.

To William Dunbar and Henry E. McGinn and Alfred F. Sears, attorneys for said Wm. Dunbar:

Take notice that I, Daniel R. Murphy, United States attorney for Oregon, will on Monday, the 29th day of January, 1894, move the court to set for hearing the motion for a new trial now pending in said cause.

DANIEL R. MURPHY,
U. S. Attorney.

Due service of the within motion by certified copy, as provided by law, is hereby admitted at Portland, Or., Jan. 23, 1894.

SEARS, JR.,
Of Attorneys for Defendant.

Endorsed: Filed January 23, 1894. R. B. Lamson, clerk.

48 And afterwards, to wit, on Friday, the 29th day of January, 1894, the same being the 46th judicial day of the regular November term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

49 In the District Court of the United States for the District of Oregon.

JANUARY 29, 1894.

THE UNITED STATES } Nos. 3420 and 3580. Indictments. Sections
vs. } 2865 and 3082, R. S.
WILLIAM DUNBAR. }

Now, at this day, comes the plaintiff, by Mr. Daniel R. Murphy, United States attorney, and the defendant, by Mr. A. F. Sears, Jr., of counsel, and on motion of said plaintiff it is ordered that this cause be, and the same is hereby, set for hearing on the motion of said defendant for a new trial on Friday, February 2, 1894.

50 And afterwards, to wit, on Thursday, the 8th day of February, 1894, the same being the 81st judicial day of the regular November term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

51 In the District Court of the United States for the District of Oregon.

FEBRUARY 8, 1894.

THE UNITED STATES } Nos. 3420 and 3580. Indictment. Sections
vs. } 2865 and 3082, R. S.
WILLIAM DUNBAR. }

This cause was heard upon the motion of the defendant for a new trial herein, and was argued by Mr. Daniel R. Murphy, United States attorney, and by Mr. A. F. Sears, Jr., of counsel for said defendant. On consideration whereof it is ordered and adjudged that said motion be, and the same is hereby, denied.

52 And afterwards, to wit, on the 8th day of February, 1894, there was duly filed in said court an opinion of the court in words and figures as follows, to wit:

53 In the District Court of the United States for the District of Oregon.

FEBRUARY 8, 1894.

THE UNITED STATES } Nos. 3420 and 3580. Indictments.
vs. } Sections 2865 and 3082, R. S.
WILLIAM DUNBAR. }

BELLINGER, *J.*:

A motion for a new trial is made in this case upon the following grounds: Insufficiency of the indictment except as to the ninth count, in not alleging knowledge on the defendant's part that the duty due on the smuggled opium had not been paid; error in admitting in evidence certain telegrams purporting to have been sent by the defendant from San Francisco to Blum, the prosecuting witness at Portland in this State; and absence of any evidence tending to show that the defendant knew that the opium, of which he is

charged in the ninth count with having facilitated the transportation, had been illegally imported into the United States.

In the case of United States *vs.* Carll, 105 U. S. 612, it is held that in an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.

The several counts of the indictment in this case, in which the defendant is charged with smuggling, allege that the defendant smuggled and clandestinely introduced into the United States opium subject to a duty of $12 per pound, which should have been invoiced, without paying or accounting for such duty, and without having such opium invoiced. This contains all the elements of the crime of smuggling. The cases of the United States *vs.* Slenker, 32 Fed. Rep. 691, and United States *vs.* Chase, 27 Fed. Rep. 807, cited in support of this motion, are cases involving violations of the postal laws by depositing obscene matter in the mails. The indictments charged the defendants with having knowingly deposited in the mails certain obscence papers. This was held insufficient. A person may knowingly deposit a letter or paper in the mails without knowledge of its obscene character. The averments of such an indictment may therefore be true and yet the defendant be innocent.

These cases do not apply to the case to be decided. The word "smuggle" has an accepted bad meaning. It conveys the idea of a secret introduction of goods with an intent to avoid payment of duty. (United States *vs.* Clafflin, 13 Blatchford 184.) The indictment charges that the defendant smuggled and clandestinely introduced the opium in question into the United States without paying or accounting for the duty required by law, and without having such opium invoiced. These allegations are inconsistent with an innocent bringing of these goods into the country. The defendant was required to pay the duty. If he clandestinely, and with intent to defraud the revenues, brought these goods here without invoicing them or paying such duty, he is guilty of a crime. It is not necessary to allege that he had knowledge of his own act. The obligation was upon him to pay the duty. The fact that he did not pay such duty could not be unknown to him.

The two dispatches claimed to have been sent from San Francisco to the defendant by Blum were admitted in evidence for the reason that Blum testified to conversations with the defendant upon the latter's return to Portland concerning these dispatches and that the latter "confirmed" them. The tendency of this testimony was to establish the authenticity of these dispatches by the admission of the defendant.

The objection is urged by the defendant's attorney that such admissions cannot be allowed because the law has made the original telegrams the only evidence admissible as to their contents. And as to this the case of The Welland Canal Company *vs.* Hathaway, in the supreme court of New York, 11 N. Y. Common Law, 495, is cited. The doctrine of that case is that where documentary evidence

is made indispensable, unless its absence is legally accounted for, to prove a fact, the admission of a party will not suffice to dispense with the production of such document. In this case the telegrams in question have no other effect than as admissions by the defendant tending to establish the charge against him. It is not a question of dispensing with solemn documentary testimony, but merely one of statements, having the effect of admissions of a party made in a writing the genuineness of which has been admitted by the party against whom it is offered. The fact of the writing adds nothing. The statements would have been just as effective as evidence had they been made orally. The defendant's admissions as to the dispatches entitle them to be received in evidence. (Whidden *vs.* Bank, 38 Am. Rep. 4.)

There is evidence going to show that the opium mentioned in the ninth count came out of a stock that had accumulated in Berg's house and that this stock of opium had been smuggled into the country at different times, with the defendant's assistance or connivance.

The motion is denied.

Mr. Daniel R. Murphy, for the United States; Mr. Alfred F. Sears, Jr., for the defendant.

(Signed) CHARLES B. BELLINGER.
U. S. District Judge, Oregon.

Endorsed: Filed Feb'y 8, 1894. R. B. Lamson, clerk.

54 And afterwards, to wit, on Tuesday, the 13th day of February, 1894, the same being the 85th judicial day of the regular November term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

55 In the District Court of the United States for the District of Oregon.

FEBRUARY 13, 1894.

THE UNITED STATES *vs.* WILLIAM DUNBAR. } Nos. 3420 and 3580. Indictments. Sections 2865 and 3082, R. S.

Now, at this day, comes the plaintiff, by Mr. Daniel R. Murphy, United States attorney, and the defendant appearing in his own proper person and by Mr. A. F. Sears, of counsel, said plaintiff moves the court for judgment upon the verdict of the jury heretofore found herein. It is therefore considered that said defendant do pay a fine of one thousand dollars, and that he be imprisoned for a term of two years; and it is ordered that until otherwise ordered or provided that this sentence of imprisonment be executed in the county jail of Multnomah county, Oregon, and that said defendant stand committed till this sentence be performed or till he be discharged according to law.

56 And afterwards, to wit, on the 13th day of February, 1894, there was issued out of said court a commitment in words and figures as follows, to wit:

57 DISTRICT OF OREGON, *ss:*

In obedience to the command of the within and annexed warrant of commitment I have conveyed the therein-named William Dunbar to the jail of Multnomah county, in said district, and him there committed to the custody of the jailer of said prison on the 13th day of February, 1894.

HENRY C. GRADY,
United States Marshal,
By H. R. SIBLEY, *Deputy.*

58 In the District Court of the United States for the District of Oregon.

THE UNITED STATES } No. 3420 & 3580. For Violation of Sections
vs. } 2865 & 3082, Revised Statutes.
WILLIAM DUNBAR. }

THE UNITED STATES OF AMERICA, }
District of Oregon, } *ss:*

The President of the United States to the marshal of the district of Oregon or to his deputy, and to the keeper of either of the jails in our said district, Greeting:

Whereas at the November term of the above-entitled court William Dunbar was duly convicted of the crime of wilfully, unlawfully, knowingly, and with intent to defraud the revenues of the United States smuggling and clandestinely introducing into the United States & into the States & district of Oregon and from a foreign port large quantities of prepared opium subject to a duty by law of $12 per pound and which should have been invoiced without paying or accounting for the said duty or any part thereof and without having said opium or any part thereof invoiced, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America, for which offense he hath this day been sentenced by our court to pay a fine of one thousand dollars and to be imprisoned in Multnomah County jail, and to be there kept for the term of two years and to stand committed till this sentence be performed:

Now, this is to command you, the said marshal or deputy, to take and keep and safely deliver the said defendant into the custody of the keeper or warden in charge of said prison forthwith.

And this is to command you, the said keeper or warden in charge of the said prison, to receive from the said marshal or deputy the said defendant, convicted and sentenced as aforesaid, and him keep and imprison in accordance with said sentence or until he be otherwise discharged by law. Hereof fail not, at your peril.

Witness the Honorable Charles B. Bellinger, judge of our said

court, and the seal thereof affixed at Portland, in said district, this February 13, 1894.

[SEAL.] R. B. LAMSON, *Clerk*,
By —— ——, *Deputy Clerk*.

[Endorsed:] No. —. In the district court of the United States for the district of Oregon. The United States *vs.* —— ——. Commitment. Endorsed: Returned and filed February 13, 1894. R. B. Lamson, clerk.

59 And afterwards, to wit, on the 15th day of February, 1894, there was duly filed in said court a petition for writ of errors in words and figures as follows, to wit:

60 In the District Court of the United States within and for the District of Oregon.

THE UNITED STATES, Defendant in Error,
vs.
WILLIAM DUNBAR, Defendant and Plaintiff in Error.

Indictment under section 2865, Revised Statutes; indictment under section 3082, Revised Statutes; two actions consolidated.

To the honorable the district court of the United States aforesaid:

Comes now the defendant in the above-entitled actions and plaintiff in error herein and respectfully petitions the said court for an order permitting him to procure a writ of error, directed from the Supreme Court of the United States, from the judgment made and entered in the said cause, in the said district court, against the said defendant, plaintiff in error and petitioner herein, and in favor of the said plaintiff, The United States of America, said judgment having been one of conviction of the crimes charged in said indictments and sentencing the said defendant and petitioner herein to imprisonment in the county jail for a period of two years and to pay a fine of one thousand dollars, and having been made and entered upon Tuesday, the thirteenth day of February, A. D. 1894, and your petitioner bases this his petition upon the assignments of error filed contemporaneously herewith in the clerk's office of the said district court.

HENRY E. McGINN AND
ALFRED F. SEARS, JR.,
Attorneys for the Above-named Defendant and
61 *Petitioner, William Dunbar.*

It is hereby ordered that a writ of error do issue as prayed for in said petition. This writ is to operate as a supersedeas and stay of execution upon the filing of the defendant's bond with two or more sureties in the sum of six thousand dollars, to be approved by the clerk of this court or by a commissioner of the circuit court of the United States, as security that the defendant shall in all respects

abide by and perform the orders and judgments of the appellate court herein.

(Signed) CHARLES B. BELLINGER, *Judge.*

Endorsed: Filed February 15, 1894. R. B. Lamson, clerk.

62 And afterwards, to wit, on the 15th day of February, 1894, there was duly filed in said court an assignment of errors in words and figures as follows, to wit:

63 In the District Court of the United States within and for the District of Oregon.

THE UNITED STATES, Defendant in Error,
vs.
WILLIAM DUNBAR, Defendant and Plaintiff in Error.

Indictment under section 2865, Revised Statutes, and indictment under section 3082; two actions consolidated.

The defendant in the above-entitled action and plaintiff in error herein having petitioned the said court for an order permitting him to procure a writ of error to this court, directed from the Supreme Court of the United States, from the judgment made and entered in the said cause against the said defendant, plaintiff in error herein, and in favor of the plaintiff, The United States of America defendant in *the* error herein, said judgment being one of conviction for the offences charged in said indictments and sentencing him to imprisonment in the county jail for two years and to pay a fine of one thousand dollars, now makes and files with his said petition the following and specifies the same as his assignments of error herein, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

I.

That the matters charged in the indictment under section 2865, Revised Statutes, as to the third and fourth counts thereof and as to the matters charged in the indictment under section 3082, Revised Statutes, as to second, fourth, and fifth counts thereof do not
64 constitute a crime by the common law or under any statute of the United States.

II.

That the matters testimony tending to prove which was given upon the trial in the above-entitled matter as to the said ninth count of said indictment under section 3082 do not constitute a crime by the common law or under any statute of the United States.

III.

That the district court of the United States for the said district of Oregon erred in not instructing the jury upon the trial of this cause

to return a verdict of not guilty upon all of the counts of each indictment upon the ground of an insufficiency of the evidence to justify a verdict of guilty; and as to the five counts of indictment under section 2865, Revised Statutes, and as to the first five counts of indictment under section 3082, Revised Statutes, upon the ground that there is no allegation of a scienter upon the part of the defendant.

IV.

That the said district court erred in its ruling in admitting testimony as to the contents of a letter written by the witness Nathan Blum to the defendant from Vancouver, British Columbia, on Major Wilson's letter-head, as evidenced in the said testimony as follows: While the said witness, NATHAN BLUM, was on the witness stand the following testimony was elicited:

Q. What Vancouver was this; British Columbia?

A. Yes, sir; Mr. Jackling was there with me and we put it aboard the steamer. I wrote to Mr. Dunbar from there on Major Wilson's letter-heads, telling him how much opium was bought and
65 how it was packed.

Counsel for defendant thereupon objected to the latter part of the answer, giving the contents of the letter, claiming that the letter was the best evidence.

Mr. GEARIN: Dunbar has got the letter. He can produce it.

Mr. MCGINN: He ought to have been served with notice to produce it.

COURT: You can ask the witness if he has the letter. There is no presumption, however, that he has. (To the witness:) You may state what you wrote to Dunbar.

Defendant excepts to the ruling.

A. I wrote to Dunbar that I had purchased 450 pounds of opium; that it was shipped in so many cases; I am pretty certain it was four cases; two cases were marked one way and two cases another way—that is, different marks.

V.

That the said district court erred in permitting the said witness, Blum, to give further testimony as to the contents of letters as follows: When the said witness, Blum, was on the stand the following testimony was admitted against the objection of defendant's counsel, to wit:

Q. They got all the opium?

A. Yes; they got all the opium, and after the thing was over Mr. Kelly, Mr. Garthorne, and Mr. Berg recited the circumstances of going down there, and Mr. Dunbar and I wrote several letters of inquiry over to Vancouver—I think I wrote most of them—to find out who this man was. We finally ascertained it was a man employed by the Canadian Pacific railroad at Vancouver, but who had

made it his interest to protect the interest of the American Government, and finally ascertained his name, and Mr. Dunbar
66 wrote repeated letters to Mr. Brown, superintendent of the Canadian Pacific, urging this man's discharge and showing the fact that he had interfered with our business.

Counsel for the defendant makes the same objection to this testimony as heretofore made and asks an exception to its admission.

WITNESS: I can produce the letters if the books were here, but Mr. Dunbar has those.

(COURT:)

Q. Has he those letters?

A. Yes, sir; they were all copied in our letter books belonging to the Merchant Steamship Company; they are all in the possession of Mr. Dunbar.

COURT: It may be admitted.

Defendant allowed an exception.

WITNESS: If the telegraph company could be subpœnaed they could show my answers to these.

Counsel for the Government read the telegram as follows:

"SAN FRANCISCO, *Jan.* 19, '93.

Nat. Blum, 45 Front street:

Larsen lost his excess baggage check. He got one No. 1487. Can you secure duplicate for him? Leave for home Friday night. Only sold three hundred sacks potatoes.

W. DUNBAR."

Q. Did you have a cipher code between you and Dunbar?

A. No; we had no cipher code; only when I was in 'Frisco and Dunbar here, or *vice versa*, we referred to opium as sacks of potatoes—in fact, we shipped a good many potatoes early in the season.

Q. What does this expression, "300 sacks of potatoes," mean?

A. 300 pounds of opium.

VI.

67 That the court erred in admitting the testimony of the said witness, Blum, as to opium not having been invoiced and as to no duty having been paid on it, as shown in the following testimony, to wit:

Q. Of that 2,090 pounds was any of it invoiced?
A. Not a pound of it.
Q. Was any duty paid on it?
A. No, sir.
Q. Not a pound of it?
A. No, sir.
Q. And it all came from British Columbia?
A. Yes, sir.
Q. On the Haytian Republic?
A. Yes.

Q. And was not submitted to the customs or revenue inspectors for investigation?

A. No.

Mr. McGINN: We submit that all the witness has said about this opium not being invoiced and no duty being paid on it should be stricken out, because it is not the evidence that the law requires, as the witness can know nothing about it.

Motion denied. Defendant allowed an exception.

And that the said court erred in admitting similar testimony as to the non-payment of duty in the following testimony found in the testimony of said witness, Blum, as follows, to wit:

Q. Excuse me. I want you first to state, if you do know, where this opium came from; whether the duty was paid on it; how it came in here.

A. Well, we had quite a lot of opium accumulated the market
, sir, Mr. Jacking was there with me and we put it aboard
ner. I wrote to Mr. Dunbar from there on Major Wilson's
tter-heads, telling him how much opium was bought and
ow it was packed.

sel for defendant thereupon objected to the latter part of the , giving the contents of the letter, claiming that the letter was st evidence.

GEARIN: Dunbar has got the letter. He can produce it.

. McGINN: He ought to have been served with notice to pro- it.

URT: You can ask the witness if he has the letter. There is presumption, however, that he has. (To the witness:) You y state what you wrote to Dunbar.

Defendant excepts to the ruling.

A. I wrote to Dunbar that I had purchased 450 pounds of opium; at it was shipped in so many cases; I am pretty certain it was
two cases were marked one way and two cases another where he always got his mail. The trunks got there on Wednesday morning. He wired me on that very Wednesday morning that Larsen"——

Objected to by defendant as not the best evidence.

WITNESS: I have got the telegrams here if you would like them. Just hand me those envelopes. (Papers are handed the witness.) Here is his telegram.

Objected to by defendant.

Mr. SEARS: I would like to see the writing before it is offered.

WITNESS: There is his telegram; they are both his, but one is not signed.

Mr. SEARS: This is a typewritten document, and does not appear to be written by anybody. I object to it as not the best evidence and not the original telegram.

(COURT:)

Q. You may state how you know that to be from Dunbar.

A. I received it from Dunbar, sir, and know it is from him, because the number- of the checks are in the telegram.

69 Q. Did he tell you afterwards about it?

A. Yes.

Q. Did you ever talk with him afterwards about the telegram?

A. Yes, sir; he confirmed this.

Q. Is the number of the check given in the telegram from which you checked that baggage?

A. Yes, sir.

Q. Was that telegram delivered by the telegraph company to you?

A. Yes, sir.

MR. MURPHY: We now offer it in evidence.

COURT: It may be admitted.

Defendant allowed an exception.

WITNESS: If the telegraph company could be subpœnaed they could show my answers to these.

Counsel for the Government read the telegram as follows:

"SAN FRANCISCO, *Jan.* 19, '93.

Nat. Blum, 45 Front street:

Larsen lost his excess baggage check. He got one No. 1487. Can you secure duplicate for him? Leave for home Friday night. Only sold three hundred sacks potatoes.

W. DUNBAR."

Q. Did you have a cipher code between you and Dunbar?

A. No; we had no cipher code; only when I was in 'Frisco and Dunbar here, or *vice versa*, we referred to opium as sacks of potatoes—in fact, we shipped a good many potatoes early in the season.

Q. What does this expression, "300 sacks of potatoes," mean?

A. 300 pounds of opium.

Q. What does Larsen mean?

A. Larsen referred to Tom Berg; he was in 'Frisco with Dunbar.

Q. Was that excess baggage check No. 1487?

A. I will explain this if you will pardon me.

Q. Go ahead.

A. He telegraphed me, "Larsen lost his excess baggage check. He got one"——

70 Objected to because the telegrams speak for themselves.

COURT: Yes; they speak for themselves; but if he wants to know further how the witness knows they were from Dunbar he can inquire."

WITNESS: I will say this: He sent me two checks. He telegraphed me the number of the one he lost. He says, "He got one numbered 1487." Immediately on receipt of this telegram I went

and hunted up Charley Ziegeler, who is the expressman at the Gilman house who hauled these trunks. I said, "Charley" ——

VIII.

That the court erred in permitting the witness Blum to testify as to the contents of telegrams sent by himself to the defendant, as found in the following testimony of the witness Blum:

Q. Did you find out from your investigation the number of the check that was lost?

A. Yes, sir.

Objected to by counsel for defendant.

COURT: I don't think he can state that. He can state what he communicated to Dunbar.

A. Well, the copies of my telegrams in this reply to this are in Mr. Dunbar's letter books.

(COURT:)

Q. Well, state the substance of them.

A. He replied to me, giving me the number of the checks, telling me that nothing——

Mr. SEARS: I would like an exception to the ruling admitting the telegrams which he sent to Dunbar, admitting his statement about them, as immaterial, hearsay, and not the best evidence, and also except to the ruling of the court on the subject.

COURT: The ruling of the court is that he can state what
71 he telegraphed to Dunbar in answer to these telegrams.

Mr. SEARS: That is the ruling I desire to except to.

COURT: Certainly you can.

A. I in effect wired him that he must get the trunk down there; nothing could be done here. I went to Mr. Rogers, who is passenger agent of the Southern Pacific, and he told me whenever a trunk was lost beyond the jurisdiction of their division, which extended to Ashland, it would be taken up in San Francisco. Then the next morning he sent me another telegram.

Q. Did you ever have a conversation with him about that telegram?

A. Yes, sir; when he came back he confirmed this.

Q. And he confirmed the other one?

A. Yes, sir; and later on I will tell you what he said when he came back.

Q. Well, right now, what did he say about this telegram—about the other telegram?

A. Well, he took them both up, and took the matter up generally when he came back.

Q. Well, what did he say when he came back?

Mr. MURPHY: I will now offer this telegram in evidence.

Q. You received that from the telegraph company, did you?

A. Yes; the next day.
Q. Here in Portland?
A. Yes, sir.

Mr. McGINN: This does not purport to be from the defendant.

COURT: What did he say that it was?
WITNESS: I say it is; I say he sent it; he admitted to me he sent it, and used the name of J. Larsen, which he had used in this prior telegram.

Mr. McGINN:

Q. I thought you said Larsen meant Berg?
A. Yes, but he admitted sending the telegram, and Berg says so.

72 Counsel for the defendant object to the introduction of the telegrams offered; are not the originals.
Overruled. Defendant excepts.

COURT: I understand the witness says that Dunbar admitted to him the sending of these dispatches.
WITNESS: Yes, sir; and so did Mr. Berg; he said he was with him when he sent them from San Francisco.

Mr. McGINN:

Q. What was that?
A. That Mr. Berg told me he knew he sent them.

COURT: Well, you cannot state what Berg said, and that will be excluded. The jury need not consider the statement of the witness as to what Berg told him.
Mr. McGINN: That Berg told him he sent that telegram?
COURT: Yes.
Mr. GEARIN: I understood the witness to say that Berg was present when Dunbar said it.
WITNESS: My statement is that Mr. Dunbar admitted to me, told me, he had sent them; and we had a conversation running over the entire loss of that check, telling me how it came to be lost, telling me of sending the telegrams and receiving my replies, and when I later met Berg he verified to me what Dunbar had said.
COURT: Well, that last statement is stricken out.

Counsel thereupon read the telegram in evidence.

WITNESS: This is in reply to my telegram, sent him on the evening before, saying I could do nothing here; that he would have to take the matter up there.

IX.

73 That the said court erred in admitting testimony as to whether or not opium was stamped, as testified to by the witness Blum as follows, to wit:
Q. Was any duty paid on 1,020 pounds of opium?
A. No, sir.

Q. Was not it stamped?
A. No, sir.

Same objection by defendant as to previous questions of the same character.

Overruled and defendant allowed an exception.

X.

That the court erred in admitting testimony of the witness Blum as to the contents of a letter written by him to the defendant, telling him how much opium he had bought in Vancouver, how it was packed, and how many packages, etc., as disclosed in the following testimony, to wit:

"While I was in Vancouver, after purchasing this opium, I wrote a letter to Mr. Dunbar, which I think I showed to Jackling, telling Dunbar how much opium I had bought, how it was packed, and how many packages. I also told him to have Garthorne and Berg at a point in the Columbia river which was just a few miles below the mouth, telling him I would telegraph from Astoria when we arrived; that they should stop at this point and when the ship came in sight to swing their lantern two or three times and when we got abreast of them we would have the pilot give one short whistle; that was a signal that the opium was thrown overboard. We started up the river about seven o'clock and about half past two or three o'clock we passed this point. I was on the bridge with Captain Moody and we saw their light——

Mr. SEARS: I suggest to your honor the ruling of yesterday
74 as to the admission of the contents of these letters and as to the circumstances of this transaction.

COURT: You asked for these letters.

Mr. SEARS: I think this comes within the ruling of yesterday. The court will allow us an exception to the contents of the letter.

COURT: Yes, sir.

XI.

That the court erred in admitting testimony of the witness SIGMUND BAER to the following effect, to wit:

Q. Did you ever turn over any proceeds of the sale of opium to Mr. Dunbar?

A. Yes, sir.

Q. How did you come to do that?

A. The proceeds of the opium were left for collection in San Francisco. I went there and collected them. I went—there was an order—there was a paper in the Pacific bank—if you will allow me I will refer to a memorandum I have.

Q. Explain it by any memorandum you have to refresh your memory or refer to it.

A. After the same of the opium had been made there was $1,295 left for collection. I collected that amount—$1,295—and paid $1,077.35 to the Pacific bank and took up the note drawn by Mr. Dunbar——

Mr. McGINN: I object to the note unless the note is produced, if your honor please.

Q. Where is that note?
A. I sent the note the same day I took it up to Mr. Blum.

Mr. MURPHY: Mr. Blum has already testified what he did with it.
COURT: You may answer the question.
Exception.

A. I paid the Pacific bank $1,077.35.

Mr. SEARS: I want an exception to the ruling.

Q. How much did you say?
75 A. $1,077.35. There had been a payment already on it; there was the balance due on the note.
Q. Whose note was it?
A. A note drawn or draft——

Objected to.

(COURT:)

Q. What was this note?
A. (cont'd). Drawn by Mr. Dunbar on Mr. Blum, held for collection by the Pacific bank.
Q. Which was it, a note or a draft?
A. A draft.

Objection overruled.

A. I then sent this draft cancelled to Mr. Blum.
Q. Where?
A. To Portland. I also was ordered to keep the money, the balance, until I was advised what to do with it.
Q. Did you ever receive any advices from Mr. Blum what to do with the balance of it?
A. I did.
Q. What did you do with it?
A. I deposited $217.65, the balance left in my hands to the credit of William Dunbar, in the Anglo-California bank.

XII.

That the said district court erred in admitting evidence introduced by the witness H. G. MALLETTE as disclosed in the testimony of said Mallette as follows, to wit:

Q. Have you with you the invoices and manifests of the steamer Wilmington on her entrance into the port of Astoria between the dates of July, 1892, and the time she ceased running?
A. Yes, sir.
Q. Have you them here?
A. Yes, sir.
Q. Produce them.
A. Yes, sir.

Q. What date did they begin on, Mr. Mallette?
A. April 4th, 1892.
Q. To what time?
A. To February 3rd, 1893.
Q. These are all of them, Mr. Mallette?
A. Yes, sir.

Mr. GEARIN: I offer these in evidence.
76 Mr. SEARS: Objected to as incompetent, irrelevant, and immaterial.
Objection overruled. Exception.

XIII.

That the said district court erred in admitting testimony of T. J. BLACK as found in the testimony of said witness as follows, to wit:

Q. What Government position do you hold, if any, Mr. Black?
A. Collector of customs.
Q. How long have you been in that position?
A. Since the 30th of June.
Q. I will ask you if you have with you from the records of your office the invoices and manifests of the steamers Haytian Republic and Wilmington upon their entrance into this port for a period from May, 1892, to——
A. From July, 1892, to April, 1893.
Q. Have you them here?
A. Yes, sir.

Mr. GEARIN: I offer them in evidence.
(Marked Gov't's Ex. L.)
Mr. MCGINN: I object to them as incompetent, irrelevant, and immaterial.
Overruled. Exception.

XIV.

That the said district court erred in sustaining an objection to the testimony of the witness H. WITTENBERG as follows, to wit:

Q. From what you know of Nathan Blum's reputation which he bears in this community or in any community where you have known of his residing, would you believe him under oath?

Objected to. Objection sustained. Exception.

Q. Now, from what you know of his moral character, is it
77 such as would render him unworthy of belief or not?

Objected to. Objection sustained. Exception.
Mr. MCGINN: Your honor will allow me an exception to our offer to show it by the witness?

XV.

That the said district court erred in sustaining an objection to a question asked the witness THOMAS COLEMAN as follows, to wit, the

said question having reference to the moral character of a witness for the Government, one Robert Garthorne, and disclosed in the testimony of said Coleman as follows, to wit:

Q. Is his moral character, in your judgment, such as to render him worthy or unworthy of belief?

Objected to as incompetent, irrelevant, and immaterial. Sustained. Exception.

XVI.

That the said court erred in sustaining an objection to a question asked E. W. COLE, a witness for the defendant, as follows, to wit:

Q. From what you know of Robert Garthorne, would his testimony in a case be such as to entitle him to belief or not?

Objected to. Sustained. Exception.

XVII.

That the said court erred in sustaining an objection to a question propounded to C. P. HOLLY, a witness on behalf of defendant, as follows:

Q. From what you know of Robert Garthorne, is he a man whose testimony would be entitled to belief or not?

Same objection, ruling, and exception.

78 XVIII.

That the said court erred in failing to instruct the jury in its charge to the said jury as to what constituted a reasonable doubt and in not defining such reasonable doubt, but in stating that they were to decide upon the strong probabilities of the case, the charge of the court upon said subject being as follows, to wit: "As to the matter of reasonable doubt, you must not be misled by what I said as to probability. That is not sufficient. You must not decide upon probabilities, but upon strong probabilities, so strong as to exclude a reasonable doubt. You do not decide questions in criminal cases the same as you do in civil cases, on the preponderance of the evidence, but there must be such a preponderance as to exclude reasonable doubt as to the guilt of the defendant." And also, "I will not undertake to define a reasonable doubt further than to say that a reasonable doubt is not an unreasonable doubt—that is to say, by a reasonable doubt you are not to understand that all doubt is to be excluded. It is impossible in the determination of these questions to be absolutely certain. You are required to decide the question submitted to you upon the strong probabilities of the case, and the probabilities must be so strong as not to exclude all doubt or possibility of error, but as to exclude reasonable doubt."

XIX.

That the said court erred in instructing the jury that the tendency of the testimony of certain witnesses, to wit, Bertha Hansen,

Dennis Conway, Tom Berg, Sigmund Baer, W. B. Johnson, and William Caples, would be corroborating testimony of the
79 accomplices, and that the court failed to charge the jury in connection with that statement that the opinion of the court was not binding upon the jury, but was for their assistance, and more especially in making said statements as to the witnesses Sig. Baer and William Caples, and in not submitting the question to the jury as to whether said Baer and Caples were accomplices or not, the instruction referred to being as follows, to wit: "By corroborating evidence I mean such evidence as emanates from other sources than those who are accomplices and as connects the defendant with the crime charged. To illustrate, in this case the testimony of Bertha Hansen is corroborating testimony—that is to say, it tends to corroborate the testimony of the witnesses for the State, the alleged accomplices, as to the storing away of certain opium in Blum's house. As to the weight you are to give this testimony, I leave that to your judgment. I content myself merely by saying that the character of this testimony is of the character of corroborating testimony. It tends to support the testimony of Blum and the other witnesses who say they were present and saw Dunbar there at the house and assisted in storing this opium in the house. The testimony of Grenfeld is of the same character, and, as I said with reference to the character of the testimony of Bertha Hansen, you are *the* determine the weight that is to be given this testimony. I tell you its tendency. Its tendency is to corroborate the testimony of the accomplices or of the alleged accomplices. Grenfeld, among other things, testifies that when the men who were employed by him hauled certain goods that are alleged to have been contraband goods, which goods were opium, and were afterwards seized in California, that he had a conversation with Blum in the presence
80 of Dunbar about the goods thus seized, and that Blum wanted him to see the man who did the hauling and advise them to turn over their claims on account of their seizure—their claim for compensation that they would be entitled to as informers—their informers' fees. The tendency of this testimony is to corroborate what Blum says on that subject and to connect Dunbar with the offense; and this testimony would tend to corroborate the testimony of Blum as to the introduction of this opium or as to its concealment or as to any act of his in facilitating the transportation of this opium, because it tends to show a guilty knowledge. Whether it does or not—whether that testimony, taken together with Blum's testimony, is sufficient for that purpose—I leave to your judgment. So, too, with reference to the testimony of Caples, the testimony of Porter Conway, the testimony of Tom Berg, the boy; that of Sigmund Baer; that of W. B. Johnson, the policeman. Now, this corroborating testimony, as I recollect the testimony in the case and as my investigation (what little I have been able to give the testimony) enables me to judge, is that as to some of the counts in the indictment, at least, there is no such corroborating testimony. I may be wrong in this. I merely make this suggestion for your assistance and guidance, and not for your government. So far as I am able

to see, there is no testimony corroborating that of the alleged accomplices as to the first count in the indictment No. 3082. As to the second count, which charges the smuggling on July 1st, 1892, of about 300 pounds of opium, the testimony shows that this opium was stored in Kellogg's boat-house and that part of this opium was found by Caples. You have heard the testimony of Caples, who stated that in pursuance of an understanding with Blum he met Blum in Portland, and together they went to
81 Dunbar's store, where he paid Caples for his interest in this one barrel Caples found; that Dunbar, he thinks, was present; that a man was there, with a hat pulled down over his eyes, — gave Blum the keys to the store or safe, so as to get the money. You are to judge from what he said as to his belief or what he said as to whether this man was Dunbar or not. If it was Dunbar, or he was there, the circumstances tends to connect him or show knowledge on his part as to the transaction which Blum testified to so far as the finding of this contraband opium goes; that refers to the second count of the indictment. As to the third count, which charges the smuggling on July 12th, 1892, of about 450 pounds of opium, I don't now recall any corroborating testimony or any testimony that tends to corroborate the testimony of the accomplices. The fourth count charges—this is indictment 3580—that the defendant smuggled on board the Hay*tain* Republic on October 28th, 1892, five hundred pounds. This was shipped to San Francisco in playing-card cases with 320 other pounds. All of it was seized in San Francisco. Now, the testimony of Grenfeld tends to corroborate that of Blum and tends to connect Dunbar with this transaction. It was about this opium and in consequence of this seizure, as he claimed, that an interview was had between Blum, Dunbar, and Grenfeld in which complaint was made to Grenfeld of the fact of his men causing the seizure of this opium and in which Blum said to Grenfeld—urged upon him in Dunbar's presence—that he take some steps to secure a portion of the money derived to these informers in consequence of the information given to secure that to Dunbar and Blum. If this was true, this would tend to connect Dunbar with this transaction, with the importation and transportation of
82 this opium; it would tend to show a knowledge of this fact of the transportation and facilitation of the transfer of this opium. As I said before with reference to the other counts, I don't wish to prejudice this case or in any — influence your minds as to whether this evidence is sufficient for this purpose; I say it tends that way. I am endeavoring to aid you by pointing out particular counts in this indictment, to support which there is no testimony to corroborate that of Blum and his associates, and other particular counts where there is testimony tending to support that of Blum and his associates, and you will distinguish between testimony that tends to prove them and testimony which does prove it. I merely instruct you as to the testimony which tends to prove certain counts, leaving to your judgment whether that testimony does so, beyond a reasonable doubt, prove the fact charged in those counts."

"The 5th count I have just spoken of before charges the defend-

ant with having smuggled 2,090 pounds on Nov. 26, 1892, and it is claimed on part of the Government that a portion of this opium was stolen from Berg's house and the balance taken to the store of Dunbar & Co. and afterwards sold. The testimony of Conway tends to corroborate the testimony of Blum as to this. The testimony of Conway, inasmuch as it is to the effect that opium was taken into the store, and that Dunbar informed him in effect that there was something upstairs that he did not want people to see, and that nobody should be allowed to go there, is a circumstance the tendency of which is to corroborate the testimony of Blum that this was stolen opium down at the store, taken from Berg's house, and that it was part of the shipment of 2,090 pounds which was alleged to have been smuggled. As I have stated, the tendency of that testimony is to connect Dunbar with the knowledge of this
83 importation of this opium."

"My object in calling particular attention to corroborating evidence was in part *ot* exclude from the consideration of the jury those counts where the testimony of Blum and others is not corroborated, those counts where I think there is not sufficient evidence under the rules and in law to justify a verdict."

XX.

That the said court erred in charging the jury that the opium testified to have been sold by the witness Sigmund Baer, if it was so sold, would be inconsistent with the theory of Dunbar's innocence, said statement of the court being as follows, to wit: "The 9th count charges the defendant with having facilitated the transportation of 200 pounds of opium on the 5th day of February, 1892. Now, this is the opium that it is claimed was sold probably by Sig. Baer. I think it is claimed to be the opium sold by Sig. Baer as is claimed for Dunbar and Blum. Sig. Baer testifies that Dunbar's drafts were paid out of the sale of opium and it is claimed it was the sale of this opium, and that the balance of the money after the payment of the draft was deposited to Dunbar's credit. If that is so the circumstance would be inconsistent with innocence on the part of Dunbar of this transportation and the tendency would be to connect Dunbar with it, because ordinarily men do not deposit money to pay the debts of other people or deposit to the credit of other people unless that money belongs to those people and there is some understanding that it is to be done. Dunbar has denied that he has any knowledge of any transaction of this character. Whether this denial is overcome by the testimony on the part of the Government is left to your judgment."

84 Also to the statement of the court in its said charge that concealment of opium would have a tendency to show importation because inconsistent with the nature of the conduct unless it was smuggled: "This was the opium that was taken from Berg's house—the balance that was taken after some had been hauled away, taken from Berg's house as I recollect the testimony. I have endeavored to be as accurate as possible, but I may be mistaken, there are so many of these transactions and so much of this testi-

mony, and I don't ask you to rely wholly upon my suggestions in the matter, but take them and compare them and ascertain for yourselves whether I am right in my suggestions or not. Now, this testimony tends to show that when this opium that Blum says was hauled up to his house arrived there Dunbar was at the house and he came before the opium came—before the others came—and hitched his horse on the opposite side of the street and was there apparently waiting for it, and after it was there Dunbar assisted in taking the stuff, as the witness described it, and concealing it in the house. If this testimony is true its tendency is to connect Dunbar with a knowledge of this transaction. He is charged with a knowledge of the importation of this opium, if it was smuggled opium, and that is the tendency of the testimony to show that it was smuggled opium, because it would not be concealed and he act this way in reference to opium that was not smuggled."

XXI.

That the said court erred in failing to instruct the jury as requested by the defendant to the effect that those shown to have been accomplices of the defendant and to have been indicted in other cases and any of whom had pleaded guilty had an
85 equitable right to a pardon, said request having been made by counsel for said defendant to the court orally as follows, to wit: "That the court instruct the jury that they may consider the fact that those witnesses, such as the witness Nathan Blum, Garthorne, Jackling, Berg, and others, who admitted that they were associates and accomplices of the defendant Dunbar and who had been indicted and convicted in this court and were now witnesses for the Government, have an equitable right to a pardon which will ordinarily not be refused, and that the jury may consider that as affecting their interest, we hereby citing thereto United States *vs.* Ford, known as the Whiskey case, 99 U. S., page 594."

Wherefore the said William Dunbar prays that the order and judgment of the said district court of the United States for the district of Oregon be reversed, and that the said district court of the United States for the district of Oregon be ordered to enter an order directing the discharge of the said William Dunbar or for a new trial of the said cause of The United States *vs.* William Dunbar, and for such other and further relief as may be appropriate.

Portland, Oregon.

HENRY E. McGINN AND
ALFRED F. SEARS, JR.,
Attorneys for Defendant and Plaintiff in Error,
Portland, Oregon.

Endorsed: Filed February 15, 1894. R. B. Lamson, clerk.

86 And afterwards, to wit, on the 15th day of February, 1894, there was duly filed in said court a bond on writ of error in words and figures as follows, to wit:

87 In the District Court of the United States for the District of Oregon.

THE UNITED STATES } Nos. 3420 & 3580, R. S. Indict. Secs. 2865
vs. & 3082, R. S.
WILLIAM DUNBAR. }

Know all men by these presents that we, William Dunbar, as principal, and J. S. Dunbar, T. N. Dunbar, and R. S. Smith, as sureties, are held and firmly bound unto the United States of America in the sum of six thousand dollars, to be paid to the said United States; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated February fifteenth, A. D. 1894.

Whereas the above-named William Dunbar has sued out a writ of error from the Supreme Court of the United States to reverse the judgment in the above-entitled cause by the district court of the United States for the district of Oregon:

Now, therefore, the condition of this obligation is such that if the above-named William Dunbar shall prosecute said writ of error to effect and shall personally appear before the district court of the United States for the district of Oregon and then and there abide the judgment of said district court heretofore rendered against him on February 13, 1894, if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

W. DUNBAR. [SEAL.]
JAS. S. DUNBAR. [SEAL.]
T. N. DUNBAR. [SEAL.]
R. S. SMITH. [SEAL.]

Signed, sealed, and delivered in the presence of—
J. A. SLADEN.
R. B. LAMSON.

Approved February 15, 1894.

R. B. LAMSON,
Clerk U. S. District Court & U. S. Comm'r.

88 UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, J. S. Dunbar, being duly sworn, depose and say that I am one of the sureties in the foregoing bond, that I am a resident and householder within said district, and that I am worth, in property situated therein, the sum of four thousand dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

J. S. DUNBAR.

Subscribed and sworn to before me this February 15, 1894.

R. B. LAMSON,
Clerk United States District Court for the District of Oregon.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, T. N. Dunbar, being duly sworn, depose and say that I am one of the sureties in the foregoing bond, that I am a resident and householder within said district, and that I am worth, in property situated therein, the sum of four thousand dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

T. N. DUNBAR.

Subscribed and sworn to before me this February 15, 1894.

R. B. LAMSON,
Clerk United States District Court for the District of Oregon.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, R. S. Smith, being duly sworn, depose and say that I am one of the sureties in the foregoing bond, that I *I* am a resident and freeholder within said district, and that I am worth, in property situated therein, the sum of four thousand dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

R. S. SMITH.

Subscribed and sworn to before me this February 15, 1894.

R. B. LAMSON,
Clerk United States District Court for the District of Oregon.

Endorsed: Filed February 15, 1894. R. B. Lamson, clerk.

89 And afterwards, to wit, on the 31st day of March, 1894, there was duly filed in said court a bill of exceptions in words and figures as follows, to wit:

90 In the District Court of the United States for the District of Oregon.

UNITED STATES, Defendant in Error, *vs.* WILLIAM DUNBAR, Defendant and Plaintiff in Error.	Indictment under Section 2865, Revised Statutes, and Indictment under Section 3082, Revised Statutes, Two Actions Consolidated.

Bill of Exceptions.

Be it remembered that upon the trial of the aforesaid issue the following proceedings took place, to wit:

91 I exception.

The witness NATHAN BLUM, being upon the witness stand as a witness on behalf of the Government and while testifying as to the

third count of indictment under section 3082, Revised Statutes, gave the following testimony and the following proceedings in reference thereto took place:

Question. What Vancouver was this—British Columbia?

Answer. Yes, sir. Mr. Jackling was there with me and we put it aboard the steamer. I wrote to Mr. Dunbar from there on Major Wilson's letter-heads, telling him how much opium was bought and how it was packed.

Counsel for defendant thereupon objected to the latter part of the answer, giving the contents of the letter, claiming that the letter was the best evidence.

Mr. GEARIN: Dunbar has got the letter. He can produce it.

Mr. MCGINN: He ought to have been served with notice to produce it.

COURT: You can ask the witness if he has the letter. There is no presumption, however, that he has. (To the witness:) You may state what you wrote to Dunbar.

Whereupon the said defendant, by his counsel, duly excepted to the ruling of the court, and his exception was by the court allowed. Whereupon the said defendant answered as follows:

Answer. I wrote to Dunbar that I had purchased 450 pounds of opium; that it was shipped in so many cases; I am pretty
92 certain it was four cases; two cases were marked one way and two cases another way—that is, different marks.

II exception.

Said witness, Blum, being still on the witness stand, the following proceedings took place:

Question. They got all the opium?

Answer. Yes; they got all the opium, and after the thing was over Mr. Kelly, Mr. Garthorne, and Mr. Berg recited the circumstances of going down there, and Mr. Dunbar and I wrote several letters of inquiry over to Vancouver—I think I wrote most of them—to find out who this man was. We finally ascertained it was a man employed by the Canadian Pacific railroad at Vancouver, but who had made it his interests to protect the interests of the American Government, and finally ascertained his name, and Mr. Dunbar wrote repeated letters to Mr. Brown, superintendent of the Canadian Pacific, urging this man's discharge and showing the fact that he had interfered with our business.

Whereupon counsel for the defendant objected to the giving of the testimony upon the ground that it was not the best evidence; and the following proceedings were thereupon furthermore had:

WITNESS: I can produce the letters if the books were here, but Mr. Dunbar has those.

(COURT:)

Question. Has he those letters?

Answer. Yes, sir; they were all copied in our letter books, belonging to the Merchant Steamship Co. They are all in the possession of Mr. Dunbar.

93 Mr. GEARIN: Counsel says they have not had any notice. We now give counsel and the defendant notice to produce these letters and the copies they have—the letter written to Dunbar and letter-press copies of letters written by him.

Mr. MCGINN: There are no such letters in existence. We have not got any such letters.

COURT: If you have the letter books of the company you can produce them.

Mr. MCGINN: Does your honor make a ruling on the request of counsel?

COURT: You have objected to this evidence on the ground that he has not produced these letters. The witness says they are in the letter book itself of Dunbar & Company.

WITNESS: Yes, sir.

COURT: Counsel has notified you that you may produce these letter books.

Mr. MCGINN: We have no such letters, and never had.

COURT: You may produce the letter books if you want to.

Whereupon the said defendant, by his counsel, excepted to the said ruling of the court, and his said exception was by the court allowed.

III exception.

Said witness, Blum, being upon the witness stand and testifying in reference to the eighth and ninth counts under R. S. 3082, the following proceedings took place:

WITNESS: "I enclosed the checks in an envelope addressed to Wm. Dunbar, No. 8 Stuart street, care of Ahnheim & Co., drug store—there where he always got his mail. The trunks got there on Wednesday morning. He wired me on that very Wednesday morning that Larsen"——

(Objected to by defendant as not the best evidence.)

WITNESS: I have got the telegrams here, if you would like them. Just hand me those envelopes. (Papers are handed to witness.) Here is his telegram——

(Objected to by defendant.)

Mr. SEARS: I would like to see the writing before it is offered.

WITNESS: There is his telegram. They are both his, but
94 one is not signed.

Mr. SEARS: This is a typewritten document and does not appear to be written by anybody. I object to it as not the best evidence and not the original telegram.

(COURT:)

Question. You may state how you know that to be from Dunbar.

Answer. I received it from Dunbar, sir, and know it is from him because the number of the checks are in the telegram.

Question. Did he tell you afterwards about it?

Answer. Yes.

Question. Did you ever talk with him afterwards about the telegram?

Answer. Yes, sir; he confirmed this.

Question. Is the number of the check given in the telegram from which you checked the baggage?

Answer. Yes, sir.

Question. Was that telegram delivered by the telegraph company to you?

Answer. Yes, sir.

Mr. MURPHY: We now offer it in evidence.

COURT: It may be admitted.

Whereupon the said defendant, by his said counsel, excepted to the ruling of the court, and his exception was by the court allowed. Said telegram was thereupon admitted in evidence and read as follows:

"SAN FRANCISCO, *Jan.* 19, '93.

Nat. Blum, 45 Front street:

Larsen lost his excess baggage check. We got one No. 1487. Can you secure duplicate for him? Leave for home Friday night. Only sold three hundred sacks of potatoes.

W. DUNBAR."

And the following additional testimony was given in reference thereto:

95 Question. Did you have a cipher code between you and Dunbar?

Answer. No. We had no cipher code; only when I was in 'Frisco and Dunbar here, or *vice versa*, we referred to opium as sacks of potatoes. In fact, we shipped a good many potatoes early in the season.

Question. What does this expression, "300 sacks of potatoes," mean?

Answer. 300 pounds of opium.

Question. What does Larsen mean?

Answer. Larsen referred to Tom Berg; he was in 'Frisco with Dunbar.

Question. Was that excess baggage check No. 1487?

Answer. I will explain this if you will pardon me.

Question. Go ahead.

Answer. He telegraphed me, "Larson lost his excess baggage check. He got one"——

IV exception.

The witness Blum being upon the witness stand and giving testimony in reference to the eighth and ninth counts in indictment under R. S. 3082, the following questions and answers were propounded:

Question. Did you find out from your investigation the number of the check that was lost?

Answer. Yes, sir.

Objected to by counsel for defendant.

COURT: I don't think he can state that. He can state what he communicated to Dunbar.

Answer. Well, the copies of my telegrams in reply to this are in Mr. Dunbar's letter books.

(COURT:)

Question. Well, state the substance of them.

Answer. He replied to me, giving me the number of the checks, telling me that nothing——

96 Whereupon the defendant, by his said counsel, objected to the question and to the testimony upon the ground that it was incompetent, irrelevant, and immaterial and not the best evidence and not original evidence and hearsay; but said objection was overruled by the court and the witness permitted to answer; to which ruling of the court defendant, by his said counsel, duly excepted, and his exception was by the court allowed, the ruling of the court being that the witness can state what he telegraphed to Dunbar in answer to those telegrams. Whereupon the testimony proceeded:

Answer. I in effect wired him that he must get the trunk down there; nothing could be done there. I went to Mr. Rogers, who is passenger agent of the Southern Pacific, and he told me whenever a trunk was lost beyond the jurisdiction of their division, which extended to Ashland, it would be taken up in San Francisco. Then the next morning he sent me another telegram.

Question. Did you ever have a conversation with him about that telegram?

Answer. Yes, sir; when he came back he confirmed this.

Question. And he confirmed the other one?

Answer. Yes, sir; and later on I will tell you what he said when he came back.

Question. Well, right now, what did he say about this telegram—about the other telegram?

Answer. Well, he took them both up, and took the matter up generally when he came back.

97 Question. Well, what did he say when he came back?

Mr. MURPHY: I will now offer this telegram in evidence.

Question. You received that from the telegraph company, did you?

Answer. Yes; the next day.

Question. Here in Portland?

Answer. Yes, sir.

Mr. McGINN: This does not purport to be from the defendant.

COURT: What did he say that it was?

WITNESS: I say it is. I say he sent it. He admitted to me he sent it and used the name of J. Larsen, which he had used in this prior telegram.

Mr. McGINN:

Question. I thought you said Larsen meant Berg?

Answer. Yes; but he admitted sending the telegram, and Berg says so.

Whereupon the said defendant, by his counsel, objected again to the introduction of the telegrams offered upon the ground that they are not originals; but said objection was by the court overruled and an exception taken and allowed by the court. Thereupon the said testimony proceeded as follows:

COURT: I understand the witness say- that Dunbar admitted to him the sending of these dispatches.

WITNESS: Yes, sir; and so did Mr. Berg. He said he was with him when he sent them from San Francisco.

Mr. McGINN:

Question. What was that?

Answer. That Mr. Berg told me he knew he sent them.

COURT: Well, you cannot state what Berg said, and that will be excluded. The jury need not consider the statement of the
98 witness as to what Berg told him.

Mr. McGINN: That Berg told him he sent that telegram?

COURT: Yes.

Mr. GEARIN: I understood the witness to say that Berg was present when Dunbar said it.

WITNESS: My statement is that Mr. Dunbar admitted to me—told me—he had sent them, and we had a conversation, running over the entire loss of that check, telling me how it came to be lost, telling me of sending the telegrams and receiving my replies; and when I later met Berg he verified to me what Dunbar had said.

COURT: Well, that last statement is stricken out.

Counsel thereupon read the telegram in evidence.

WITNESS: That is in reply to my telegram sent him on the evening before saying I could do nothing here; that he would have to take the matter up there.

99 V exception.

Said witness Blum, being upon the witness stand, gave testimony as follows, to wit:

"While I was in Vancouver, after purchasing this opium, I wrote a letter to Mr. Dunbar, which I think I showed to Jackling, telling Mr. Dunbar how much opium I had bought, how it was packed, and how many packages. I also wrote him to have Garthorne and Berg at a point in the Columbia river which was just a few miles below the mouth, telling him I would telegraph him from Astoria when we arrived; that they should stop at this point, and when the ship came in sight to swing their lantern two or three times and when we got abreast of them we would have the pilot give one short whistle. That was a signal that the opium was thrown overboard."

Whereupon the defendant, by his said counsel, moved the court to strike out said testimony upon the ground that it was incompetent, immaterial, irrelevant, hearsay, and not the best evidence; which motion was by the court denied, and the said defendant thereupon duly excepted and his exception was by the court allowed.

VI exception.

The witness SIGMUND BAER, having been called as a witness by and on behalf of the Government to sustain the allegations of the indictment, testified as follows, among other things, to wit:

Question. Did you ever turn over any proceeds of the sale of opium to Mr. Dunbar?

Answer. Yes, sir.

Question. How did you come to do that?

Answer. The proceeds of the opium were left for collection in San Francisco. I went there and collected them. I went—there
100 was an order—there was a paper in the Pacific bank. If you will allow me I will refer to a memorandum I have.

Question. Explain it or any memorandum you have to refresh your memory or refer to it.

Answer. After the sale of the opium had been made there was $1,295 left for collection. I collected that amount, $1,295, and paid $1,077.35 to the Pacific bank and took up the note drawn by Mr. Dunbar.

Whereupon the defendant, by his counsel, objected to the introduction of any testimony as to the contents of the note or reference thereto upon the ground that the note would be the best evidence; but the said objection was by the court overruled; to which ruling of the court defendant excepted and his exception was allowed; thereupon the witness answered and gave testimony as follows:

Answer. I paid the Pacific bank $1,077.35.

Question. How much did you say?

Answer. $1,077.35. There had been a payment already on it; that was the balance due on the note.

Question. Whose note was it?

Answer. A note drawn or draft——

(COURT:)

Question. What was this note?

Answer (cont'd). Drawn by Mr. Dunbar on Mr. Blum, held for collection by the Pacific bank.

Question. Which was it, a note or a draft?

Answer. A draft.

101 *Answer.* I then sent this draft cancelled to Mr. Blum.

Question. Where?

Answer. To Portland. I also was ordered to keep the money—the balance—until I was advised what to do with it.

Question. Did you ever receive any advises from Mr. Blum what to do with the balance of it?

Answer. I did.

Question. What did you do with it?

Answer. I deposited $217.65, the balance left in my hands to the credit of William Dunbar, in the Anglo-California bank.

VII exception.

The witness H. WITTENBERG, called as a witness by and on behalf of defendant, was asked the following question, to wit, in reference to the said Nathan Blum, a witness on behalf of the Government hereinbefore referred to, said witness having before testified that he was well acquainted with Nathan Blum and well acquainted with his general reputation in this community and in the community in which he had lived for truth and veracity.

Question. From what you know of Nathan Blum's reputation which he bears in this community or in any community where you have known of his residing, would you believe him under oath?

Whereupon the Government, by the district attorney, objected to said question and said objection was by the court sustained; whereupon defendant excepted to the ruling of the court and his exception was by the court allowed.

102 The said witness, Wittenberg, having also testified that he was acquainted with the general moral character of the said witness, Blum, was asked the following question by counsel for defendant:

Question. Now, from what you know of his moral character, is it such as would render him unworthy of belief or not?

But the Government, through its attorney, objected to the said question, and its objection was sustained by the court; to which ruling of the court the defendant, by his counsel, excepted and his exception was by the court allowed.

VIII exception.

One THOMAS COLEMAN was called as a witness by and on behalf of the defendant, and after having testified that he was well acquainted with one Robert Garthorne, a witness for the Government, and that he knew his general reputation for truth and veracity, and his general moral character in this community, was asked by counsel for defendant the following question, to wit:

Question. Is his moral character, in your judgment, such as to render him worthy or unworthy of belief?

To which question the Government, by its attorney, objected, and said objection was by the court sustained; to which ruling of the court the defendant, by his counsel, duly excepted and his exception was allowed by the court.

103 IX exception.

After the rendition of testimony said court instructed the jury upon the issues and the law, said instruction on the subject of a reasonable doubt being as follows, to wit:

"As to the matter of reasonable doubt, you must not be misled by what I said as to probability. That is not sufficient. You must no- decide upon probabilities, but upon strong probabilities—so strong as to exclude a reasonable doubt. You do not decide questions in criminal cases the same as you do in civil cases, on the preponderance of the evidence, but there must be such a preponderance as to exclude reasonable doubt as to the guilt of the defendant;" purpose. I say it tends that way. I am endeavoring to aid you by pointing out particular counts in this indictment to support which there is no testimony to corroborate that of Blum and his associates and other particular counts where there is testimony tending to support that of Blum and his associates, and you will distinguish between testimony that tends to prove them and testimony which does prove it. I merely instruct you as to the testimony which tends to prove certain counts, leaving to your judgment whether that testimony does so beyond a reasonable doubt prove

104 To which instruction of the court the defendant, by his said counsel, excepted upon the ground that it had failed to instruct the jury as to what constituted a reasonable doubt, and in not defining such reasonable doubt and in charging that the jury were to decide upon the strong probabilities of the case; which exception was by the court duly allowed.

X exception.

The court furthermore instructed the jury as follows:

"By corroborating evidence I mean such evidence as emanates from other sources than those who are accomplices and as connects the defendant with the crime charged. To illustrate, in this case the testimony of Bertha Hansen is corroborating testimony—that is to say, it tends to corroborate the testimony of the witnesses for

the State, the alleged accomplices, as to the storing away of certain opium in Blum's house. As to the weight you are to give this testimony, I leave that to your judgment. I content myself merely by saying that the character of this testimony is of the character of corroborating testimony. It tends to support the testimony of Blum and the other witnesses who say they were present and saw Dunbar there at the house and assisted in storing this opium in the house. The testimony of Grenfeld is of the same character, and, as I said with reference to the character of the testimony of Bertha Hansen, you are to determine the weight that is to be given this testimony. I tell you its tendency is to
105 corroborate the testimony of the accomplices or of the alleged accomplices. Grenfeld, among other things, testifies that when the men who were employed by him hauled certain goods that are alleged to have been contraband goods, which goods were opium and were afterwards seized in California, that he had a conversation with Blum in the presence of Dunbar about the goods thus seized, and that Blum wanted him to see the man who did the hauling and advise them to turn over their claims on account of their seizure, their claim for compensation that they would be entitled to as informers, their informers' fees. The tendency of this testimony is to corroborate what Blum says on that subject and to connect Dunbar with the offence, and this testimony would tend to corroborate the testimony of Blum as to the introduction of this opium or as to its concealment or as to any act of his in facilitating the transportation of this opium, because it tends to show a guilty knowledge; whether it does or not, whether that testimony with his general reputation in this community and in the community in which he had lived for truth and veracity.

Question. From what you know of Nathan Blum's reputation which he bears in this community or in any community where you have known of his residing, would you believe him under oath?

Whereupon the Government, by the district attorney, objected to said question and said objection was by the court sustained; whereupon defendant excepted to the ruling of the court and his exceptions suggestion for your assistance and guidance and not for your government. So far as I am able to see there is no testimony corroborating that of the alleged accomplices as to the first count in the indictment No. 3082. As to the second count, which charges the smuggling on July 1st, 1892, of about 300 pounds of opium,
106 the testimony shows that this opium was stored in Kellog's boat-house, and that part of this opium was found by Caples. You have heard the testimony of Caples, who stated that in pursuance of an understanding with Blum he met Blum in Portland, and together they went to Dunbar's store, where he paid Caples for his interest in this one barrel Caples found; that Dunbar, he thinks, was present; that a man was there with a hat pulled down over his eyes; gave Blum the keys to the store or safe so as to get the money. You are to judge from what he said as to his belief or what he said as to whether this man was Dunbar or not. If it was Dunbar or

he was there the circumstances tend to connect him or show knowledge on his part as to the transaction which Blum testified to so far as the finding of this contraband opium goes. That refers to the second count of the indictment. As to the third count, which charges the smuggling on July 12th, 1892, of about 450 pounds of opium, I don't now recall any corroborating testimony or any testimony that tends to corroborate the testimony of the accomplices. The fourth count charges—that is, indictment 3580—that the defendant smuggled on board the Haytian Republic on October 28th, 1892, five hundred pounds. This was shipped to San Francisco in playing-card cases with 320 other pounds. All of it was seized in San Francisco. How the testimony of Grenfeld tends to corroborate that of Blum and tends to connect Dunbar with this transaction. It was about this opium and in consequence of this seizure, as he claimed, that an interview was had between Blum, Dunbar, and Grenfeld, in which complaint was made to Grenfeld of the fact of his men causing the seizure of this opium, and in which Blum said to Grenfeld, urged upon him in Dunbar's presence, that he take some steps to secure a portion of the money derived to these informers in consequence of the information given, to *d*ecure that to Dunbar and Blum. If this was true this would tend
107 to connect Dunbar with this transaction, with the importation and transportation of this opium. It would tend to show a knowledge of this fact of the transportation and facilitation of the transfer of this opium. As I said before with reference to the other counts, I don't wish to prejudice this case or in any way influence your minds as to whether this evidence is sufficient for this purpose; I say it tends that way. I am endeavoring to aid you by pointing out particular counts in this indictment to support which there is no testimony to corroborate that of Blum and his associates and other particular counts where there is testimony tending to support that of Blum and his associates, and you will distinguish between testimony that tends to prove them and testimony which does prove it. I merely instruct you as to the testimony which tends to prove certain counts, leaving to your judgment whether that testimony does so beyond a reasonable doubt prove the fact charged in those counts."

"The 5th count I have just spoken of before charges the defendant with having smuggled 2,090 pounds on Nov. 26, 1892, and it is claimed on the part of the Government that a portion of this opium was stolen from Berg's house and the balance taken to the store of Dunbar & Co. and afterwards sold. The testimony of Conway tends to corroborate the testimony of Blum as to this. The testimony of Conway, inasmuch as it is to the effect that opium was taken into the store and that Dunbar informed him, in effect, that there was something upstairs that he did not want people to see and that nobody should be allowed to go there, is a circumstance
plices of the defendant Dunbar and who had been indicted and convicted in this court and were now witnesses for the Government,
112 have an equitable right to a pardon, and that the jury may consider that circumstance as affecting their interest; but the

stated, the tendency of that testimony is to connect Dunbar with the knowledge of this importation of this opium."

"My object in calling particular attention to corroborating evidence was in part to exclude from the consideration of the jury those counts where the testimony of Blum and others is not corroborated, those counts where I think there is not sufficient evidence under the rules and in law to justify a verdict."

To which instruction defendant, by his said counsel, duly excepted upon the ground that the court erred in instructing the jury that the tendency of the testimony of certain witnesses, to wit, Bertha Hansen, Dennis Conway, Tom Berg, Sigmund Baer, W. B. Johnson, and William Caples, would be corroborating testimony of the accomplices, and because the court failed to charge the jury in that connection with that statement that the opinion of the court was not binding upon the jury, but was for their assistance, and in not submitting to the jury the question as to whether Sig. Baer and William Caples were accomplices or not; which exception was by the court allowed.

109 The testimony of the said Sigmund Baer, who was called as a witness by and on behalf of the Government, being to the effect that he had sold none of the opium referred to in the indictment for the defendant and the witness Blum in San Francisco; that he turned over some of the proceeds of the sale of such opium to the defendant; that the said opium had no stamp on it, and that from that fact he supposed it was smuggled opium.

The testimony of the said witness Cables was substantially to the effect that on or about the 1st of July, 1892, he found a barrel afloat in the river and took it ashore (the said barrel being one that the witness Blum had testified was a part of the illegal importation or smuggled opium upon which the indictment was based); that, after taking it ashore, the witness Blum conversed with him on the subject, and in the conversation he informed Blum that he believed the barrel contained opium; that he opened the barrel and informed himself of its contents and told Blum that he knew it was opium; that the witness Blum told him that he did not think that he looked like a man who would want to ruin a man or send him to the penitentiary; that the men there in charge of the opium had every dollar that they had in the world in these barrels, and finally agreed to give him $50.00; that the witness Caples came to Portland to get his money after having given up the opium through said Blum, and went to the store on Front street, which was the store of the defendant and the witness Blum, and that there was present a man with a hat pulled over his eyes that looked something like the defendant, and that he there received the money before referred to by the witness.

XI exception.

was present; that a man was there with a hat pulled down over his eyes; gave Blum the keys to the store or safe so as to get the money. You are to judge from what he said as to his belief or what he said as to whether this man was Dunbar or not. If it was Dunbar or

several counts I wish to state briefly some general principles of evidence that apply to the determination of the questions submitted to you. First, evidence of good character on the part of the defendant has been admitted and is relevant to the question as to whether the defendant is guilty or not guilty. This evidence is introduced for the purpose of inducing you to believe from the high improbability that a person of good character should have
114 committed the crime charged that the defendant did not commit the crime with which he is charged. The weight to be given this evidence is a question for you. It does not necessarily follow that because the defendant is a man of good character, if you so find him, that he is innocent of the crime with which he is charged. If the rule was otherwise a man of good character could escape punishment, though guilty, by the mere fact of good character. It is a matter that addresses itself to the judgment of the jury as to whether a man of good character would be likely to en-

XII exception.

The court furthermore instructed the jury as follows, to wit:

"This was the opium that was taken from Berg's house, the balance that was taken after some had been hauled away—taken from Berg's house, as I recollect the testimony. I have endeavored to be as accurate as possible, but I may be mistaken; there are so many of these transactions and so much of this testimony, and I don't ask you to rely wholly upon my suggestions in the matter, but
111 take them and compare them and ascertain for yourselves whether I am right in my suggestions or not. Now, this testimony tends to show that when this opium that Blum says was hauled up to his house arrived here Dunbar was at the house, and he came before the opium came—before the others came—and hitched his horse on the opposite side of the street, and was there apparently waiting for it, and after it was there Dunbar assisted in taking the stuff, as the witness described it, and concealing it in the house. If this testimony is true, its tendency is to connect Dunbar with a knowledge of this transaction. He is charged with a knowledge of the importation of this opium, if it was smuggled opium, and that is the tendency of the testimony, to show that it was smuggled opium, because it would not be concealed and he act this way in reference to opium that was not smuggled."

To which charge of the court the defendant, by his said counsel, duly excepted, and his exception was by the court allowed.

XIII exception.

Thereupon said defendant, by his said counsel, duly requested the court to instruct the jury that they may consider the fact that these witnesses, such as the witnesses Nathan Blum, Garthorne, Jackling, Berg, who admitted that they were associates and accomplices of the defendant Dunbar and who had been indicted and convicted in this court and were now witnesses for the Government,
112 have an equitable right to a pardon, and that the jury may consider that circumstance as affecting their interest; but the

stated, the tendency of that testimony is to connect Dunbar with the knowledge of this importation of this opium."

"My object in calling particular attention to corroborating evidence was in part to exclude from the consideration of the jury those counts where the testimony of Blum and others is not corroborated, those counts where I think there is not sufficient evidence under the rules and in law to justify a verdict."

To which instruction defendant, by his said counsel, duly excepted upon the ground that the court erred in instructing the jury that the tendency of the testimony of certain witnesses, to wit, Bertha Hansen, Dennis Conway, Tom Berg, Sigmund Baer, W. B. Johnson, and William Caples, would be corroborating testimony of the accomplices, and because the court failed to charge the jury in that connection with that statement that the opinion of the court was not binding upon the jury, but was for their assistance, and in not submitting to the jury the question as to whether Sig. Baer and William Caples were accomplices or not, which exception was duly allowed.

The indictment charges that he smuggled in the same steamer about July 1st, 1892, about 300 pounds, which was stored in Kellogg's boat-house on the night of its arrival here and was sold the next day. The third count—you are not to understand that the indictment contains allegations with reference to the sale of this opium; that is my own statement—as to what is claimed—the third count charges the defendant with having smuggled on the steamer Wilmington July 12th, 1892, about 450 pounds of opium; the fourth count that he smuggled on the steamer Haytian Republic October 28th, 1892, about 500 pounds of opium; the 5th count that he smuggled on the said steamer, the Haytian Republic, on Nov. 26th, 1892, 2,090 pounds of opium. The sixth count is waived by the United
113 States; the seventh count charges the defendant with having facilitated the transportation on October 29th, 1892, of about 820 pounds of opium. The facilitating of the transportation of opium is a crime under this statute as well as the importation or smuggling of opium itself. The 8th count in this indictment is waived by the Government. The 9th count charges the defendant with facilitating the transportation on February 5th, 1893, of 200 pounds of opium. These are all the counts in the first indictment—that is, the long indictment. It is the second indictment in point of time. This indictment then contains seven counts, in which the defendant is charged with the commission of this crime of smuggling and of facilitating the transportation of opium.

The indictment numbered 3420 charges the defendant with having unlawfully introduced or smuggled upon the Haytian Republic on July 25th, 1893, 300 pounds of opium; on August 20th of the same year 800 pounds of opium; that is the second count; the third count charges him with importing or smuggling on September 2nd, 1892, on the Haytian Republic, 1,400 pounds of opium; the 4th count charges him with smuggling on the steamer Haytian Republic, on the 22nd day of February, 1893, 900 pounds of opium; the 5th count charges him in like manner with having smuggled on the 27th day of January, 1893, into this district 1,020 pounds of opium. Before calling your attention more particularly to these

several counts I wish to state briefly some general principles of evidence that apply to the determination of the questions submitted to you. First, evidence of good character on the part of the defendant has been admitted and is relevant to the question as to whether the defendant is guilty or not guilty. This evidence is introduced for the purpose of inducing you to believe from the high improbability that a person of good character should have
114 committed the crime charged that the defendant did not commit the crime with which he is charged. The weight to be given this evidence is a question for you. It does not necessarily follow that because the defendant is a man of good character, if you so find him, that he is innocent of the crime with which he is charged. If the rule was otherwise a man of good character could escape punishment, though guilty, by the mere fact of good character. It is a matter that addresses itself to the judgment of the jury as to whether a man of good character would be likely to engage in the criminal acts charged. If, notwithstanding such evidence, the jury still believe he is guilty, it is their duty to so find. If such evidence has the effect to create a reasonable doubt of the defendant's guilt, it is your duty to find him not guilty. I will not undertake to define a reasonable doubt further than to say that a reasonable doubt is not an unreasonable doubt—that is to say, by a reasonable doubt you are not to understand that all doubt is to be excluded; it is impossible in the determination of these questions to be absolutely certain. You are required to decide the question submitted to you upon the strong probabilities of the case, and the probabilities must be so strong as not to exclude all doubt or possibility of error, but as to exclude reasonable doubt.

Evidence of the bad character for truth of the witnesses Blum and Garthorn and of their bad moral character as affecting their veracity has been received and is proper for your consideration in determining the weight to be given to the testimony of these witnesses. Their reputations may be bad in this respect and yet they may have told the truth in their testimony. You should receive the testimony of a witness who is thus impeached with caution, and it may justify you in discrediting them altogether; and
115 so with reference to the testimony of accomplices in the alleged crime, such testimony in so far as it is not corroborated should not be allowed to convict, and I instruct you not to convict the defendant upon any count in either of these indictments upon the uncorroborated testimony of accomplices. You are not to suppose that accomplices are incompetent witnesses. You should not disregard their testimony because they are accomplices. If you believe their testimony, and if such testimony is corroborated by other testimony, and if that testimony thus corroborated the testimony of accomplices and the corroborating testimony taken together satisfies you beyond a reasonable doubt of the defendant's guilt, you should find accordingly. By corroborating evidence I mean such evidence as emanates from other sources than those who are accomplices, and as connects the defendant with the crime charged. To illustrate, in this case the testimony of Bertha Hansen is corroborating testi-

mony--that is to say, it tends to corroborate the testimony of the witnesses for the State, the alleged accomplices, as to the storing away of certain opium in Blum's house. As to the weight you are to give this testimony, I leave that to your judgment. I content myself merely by saying that the character of this testimony is of the character of corroborating testimony. It tends to support the testimony of Blum and the other witnesses who say they were present and saw Dunbar there at the house and assisted in storing this opium in the house. The testimony of Grenfeld is of the same character, and, as I said with reference to the character of the testimony of Bertha Hansen, you are to determine the weight that is to be given this testimony. I tell you its tendency, its tendency is to corroborate the testimony of the accomplices or of the alleged accomplices. Grenfeld, among other things, testifies that when the
116 men who were employed by him hauled certain goods that are alleged to have been contraband goods, which goods were opium and were afterwards seized in California, that he had a conversation with Blum in the presence of Dunbar about the goods thus seized, and that Blum wanted him to see the men who did the hauling and advise them to turn over their claims on account of this seizure—their claim for compensation that they would be entitled to as informers, their informers' fees. The tendency of this testimony is to corroborate what Blum says on that subject and to connect Dunbar with the offence, and this testimony would tend to corroborate the testimony of Blum as to the introduction of this opium, or as to its concealment, or as to any act of his in facilitating the transportation of this opium, because it tends to show a guilty knowledge. Whether it does or not; whether that testimony taken together with Blum's testimony is sufficient for that purpose, I leave to your judgment. So, too, with reference to the testimony of Caples, the testimony of Porter Conway, the testimony of Tom Berg, the boy; that of Sigmund Baer, that of W. B. Johnson, the policeman. Now, this corroborating testimony, as I recollect the testimony in the case and as my investigation (what little I have been able to give the testimony) enables me to judge, is that as to some of the counts in the indictment, at least there is no such corroborating testimony. I may be wrong in this. I merely make this suggestion for your assistance and guidance, not for your government. So far as I am able to see, there is no testimony corroborating that of the alleged accomplices as to the 1st count in indictment No. 3082. As to the 2nd count, which charges the smuggling on July 1st, 1892, of about 300 pounds of opium, the testimony shows that this opium was stored in Kellogg's boat-house, and that part of this opium was found by Caples.
You have heard the testimony of Caples, who stated that in
117 pursuance of an understanding with Blum he met Blum in Portland, and together they went to Dunbar's store, where he paid Caples for his interest in this one barrel Caples found; that Dunbar, he thinks, was present; that a man was there, with a hat pulled down over his eyes, — gave Blum the keys to the store or safe so as to get the money. You are to judge from what he said as to

his belief or what he said as to whether this man was Dunbar or not. If it was Dunbar, or he was there, the circumstances tend to connect him or show knowledge on his part as to the transaction which Blum testified to so far as the finding of this contraband opium goes. That refers to the second count of the indictment. As to the third count, which charges the smuggling on July 21*th*, 1892, of about 450 pounds of opium, I don't now recall any corroborating testimony or any testimony that tends to corroborate the testimony of the accomplices. The fourth count charges—that is indictment 3580—that the defendant smuggled on board the Haytian Republic, on October 28th, 1892, 500 pounds. This was shipped to San Francisco in playing-card cases with 320 other pounds. All of it was seized in San Francisco. Now, the testimony of Grenfeld tends to corroborate that of Blum and tends to connect Dunbar with this transaction. It was about this opium and in consequence of this seizure, as he claims, that an interview was had between Blum, Dunbar, and Grenfeld, in which complaint was made to Grenfeld of the fact of his men causing the seizure of this opium, and in which Blum said to Grenfeld—urged upon him in Dunbar's presence—that he take some steps to secure a portion of the money derived to these informers in consequence of the information given; to secure that to Dunbar and Blum. If this was true this would tend to connect Dunbar with this transaction—with the importation and transportation of this opium. It would tend to show a knowledge
118 of this opium. As I said before with reference to the other counts, I don't wish to prejudice this case or in any way influence your minds as to whether this evidence is sufficient for this purpose; I say it tends that way. I am endeavoring to aid you by pointing out particular counts in this indictment to support which the*ir* is no testimony to corroborate that of Blum and his associates, and other particular counts where there is testimony tending to support that of Blum and his associates, and you will distinguish between testimony that tends to prove them and testimony which does prove it. I merely instruct you as to the testimony which tends to prove certain counts, leaving to your judgment whether that testimony does so beyond a reasonable doubt prove the fact charged in those counts.

Now, this 820 pounds of opium, consisting of 500 pounds and 320 pounds packed in cases, is charged to have been transported—two crimes are charged as to this opium—the defendant is charged with having introduced or smuggled this opium into the country, and he is also charged with facilitating its transportation; I instruct you, gentlemen, that you may find the defendant guilty of either one of these charges, but you cannot find him guilty of both, and upon these same facts you can only find him guilty of one offence, and that will be of either smuggling this opium into the country or facilitating its transportation to San Francisco.

The 5th count, I have just spoken of before, charges the defendant with having smuggled 2,090 pounds on November 26th, 1892, and it is claimed on the part of the Government that a portion of this opium was stolen from Berg's house and the balance taken

to the store of Dunbar & Co. and afterwards sold. The testimony of Conway tends to corroborate the testimony of Blum as to this. The testimony of Conway, inasmuch as it is to the effect that opium was taken into the store, and that Dunbar informed
119 him in effect that there was something upstairs that he did not want people to see, and that nobody should be allowed to go there, is a circumstance the tendency of which is to corroborate the testimony of Blum that this was stolen opium down at the store taken from Berg's house, and that it was part of the shipment of 2,090 pounds, which was alleged to have been smuggled. As I have stated, the tendency of that testimony is to connect Dunbar with the knowledge of this importation of this opium.

The eight- count you have already heard is waived by the Government.

The 9th count charges the defendant with having facilitated the transportation of 200 pounds of opium on the 5th of February, 1892. Now, this is the opium that it is claimed was sold probably by Sig. Baer. I think it is claimed to be the opium sold by S-g. Baer as is claimed for Dunbar and Blum. Sig. Baer testifies that Dunbar's drafts were paid out of the sale of opium, and it is claimed it was the sale of this opium, and that the balance of the money after the payment of the draft was deposited to Dunbar's credit. If that is so, the circumstance would be inconsistent with innocence on the part of Dunbar of this transportation, and the tendency would be to connect Dunbar with it because ordinarily men do not deposit money to pay the debts of other people or deposit to the credit of other people unless that money belongs to those people and there is some understanding that it is to be done. Dunbar has denied that he has any knowledge of any transaction of this character. Whether this denial is overcome by the testimony on the part of the Government is left to your judgment.

The counts contained in indictment No. 3420, the second indictment, the 3rd count as I remember the testimony, there is nothing to corroborate the testimony of the accomplices as to the
120 first and second counts of this indictment. As to the third count of this indictment, which is for smuggling 1,400 pounds of opium on the 2nd day of September, 1892, the testimony of Bertha Hansen tends to corroborate that of Blum and others. This was the opium that was taken from Berg's house, the balance that had been taken after some had been hauled away, taken from Berg's house as I recollect the testimony. I have endeavored to be as accurate as possible, but I may be mistaken, there are so many of these transactions and so much of this testimony, and I don't ask you to rely wholly upon my own suggestions in the matter, but take them and compare them and ascertain for yourself whether I am right in my suggestions or not. Now, this testimony tends to show that when this opium that Blum says was hauled up — his house arrived there Dunbar was at the house, and he came before the opium came and hitched his horse on the opposite side of the street, and was there apparently waiting for it, and after it was there Dunbar assisted in taking the stuff, as the witness describes it,

and concealing it in the house. If this testimony is true its tendency is to connect Dunbar with a knowledge of this transaction. He is charged with a knowledge of the importation of this opium, if it was smuggled opium, and that is the tendency of the testimony, to show that it was smuggled opium, because it would not be concealed and he act this way in reference to opium that was not smuggled.

The 4th count of the 2nd indictment charges the defendant with having smuggled 900 pounds, with 200 additional pounds bought by Jackling, alleged to have been smuggled into the country on the 22nd day of February, 1892. Now, a portion of this lot of opium is that alleged to have been taken into the store and secreted there—no, not taken to the store—this is the lot that was
121 stolen in whole or in part and the man Adams' name is connected with this opium. This is the opium—that is, the lot—where Officer W. B. Johnson was called in by Blum, who employed him to locate this opium, to hunt it up, and the testimony of the witness Johnson is that, after working for some three days, he reported to Dunbar he was unable to locate the opium, and that Dunbar paid him for his services. The tendency of this testimony is obviously to connect Dunbar with knowledge of this smuggled opium and if he knew of its existence that would tend to show that he knew of the importation of this opium, and that would tend to connect him with the importation of this opium. As I have already stated with reference to these matters, it is a question solely for your determination as to whether this testimony establishes the fact beyond a reasonable doubt *of* the defendant is guilty of the several crimes charged against him in these indictments.

As to the matter of reasonable doubt, you must not be misled by what I said as to probability. That is not sufficient. You must not decide upon probabilities, but upon strong probabilities; so strong as to exclude a reasonable doubt. You do not decide questions in criminal cases the same as you do in civil cases, on the preponderance of the evidence, but there must be such a preponderance as to exclude reasonable doubt as to the guilt of the defendant. My object in calling particular attention to corroborating evidence was in part to exclude from the consideration of the jury those counts where the testimony of Blum and others is not corroborated, those counts where I think there is not sufficient evidence under the rules and in law to justify a verdict.

And forasmuch as the facts aforesaid and the decisions of the court thereon do not appear of record, the defendant prays that this his bill of exceptions may be allowed.

(Signed) CHARLES B. BELLINGER,
U. S. Dist. Judge.

Endorsed: Filed March 31, 1894. R. B. Lamson, clerk.

122 UNITED STATES OF AMERICA, }
District of Oregon, } *ss:*

I, Roswell B. Lamson, clerk of the district court of the United States for the district of Oregon, do hereby certify that the foregoing pages numbered 1 to 121, inclusive, contain a full, true, and complete transcript of the record and proceedings had in said district court in the cause wherein The United States is plaintiff and William Dunbar is defendant, numbered 3420 & 3580, consolidated, as the same appear of record at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said district court, at Portland, in said district, this second day of April, in the year of our Lord one thousand eight hundred & ninety-four.

[Seal United States District Court, Oregon.]

ROSWELL B. LAMSON,
Clerk of said District Court.

Endorsed on cover: Case No. 15,575. Oregon D. C. U. S. Term No., 693. William Dunbar, plaintiff in error, *vs.* The United States. Filed April 16th, 1894.

156 20

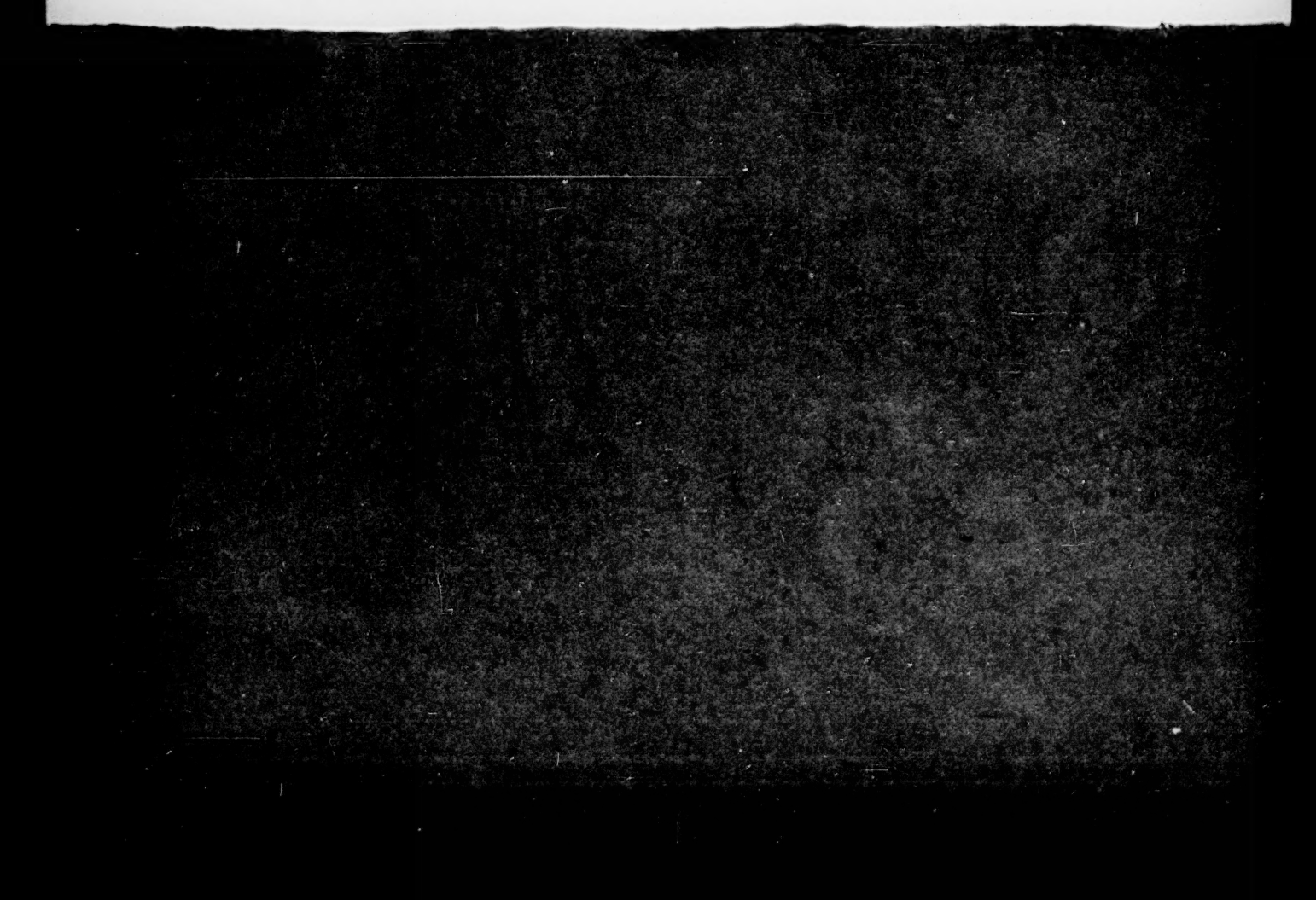
APR 23 1894
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

WILLIAM DUNBAR, PLAINTIFF IN error,
v.
THE UNITED STATES.
} No. 1191.

MOTION TO ADVANCE.



In the Supreme Court of the United States.

OCTOBER TERM, 1893.

WILLIAM DUNBAR, PLAINTIFF IN error, *v.* THE UNITED STATES.	No. 1191.

MOTION TO ADVANCE.

The plaintiff in error was convicted in the district court of the United States for the district of Oregon of smuggling into the United States large quantities of prepared opium, in violation of section 2865 of the Revised Statutes, and of facilitating the transportation and concealing large quantities of opium brought into the country in violation of section 3082 of the Revised Statutes. On February 13, 1894, he was sentenced to pay a fine of $1,000, and to be imprisoned in the county jail of Multnomah County, Oregon, for the term of two years. He is now out on bail in the sum of $6,000, pending the decision of this court.

In accordance with rule 26, section 3, the Solicitor-General respectfully moves that the case be advanced upon the docket and set down for hearing at such early day during the next term as may be convenient to the court.

Notice of this motion has been served on the counsel for the plaintiff in error, and proof of service filed with the clerk of this court.

LAWRENCE MAXWELL, JR.,
Solicitor-General.

156-A

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CLERK

152-185

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 693.

WILLIAM DUNBAR, Plaintiff in Error,

vs.

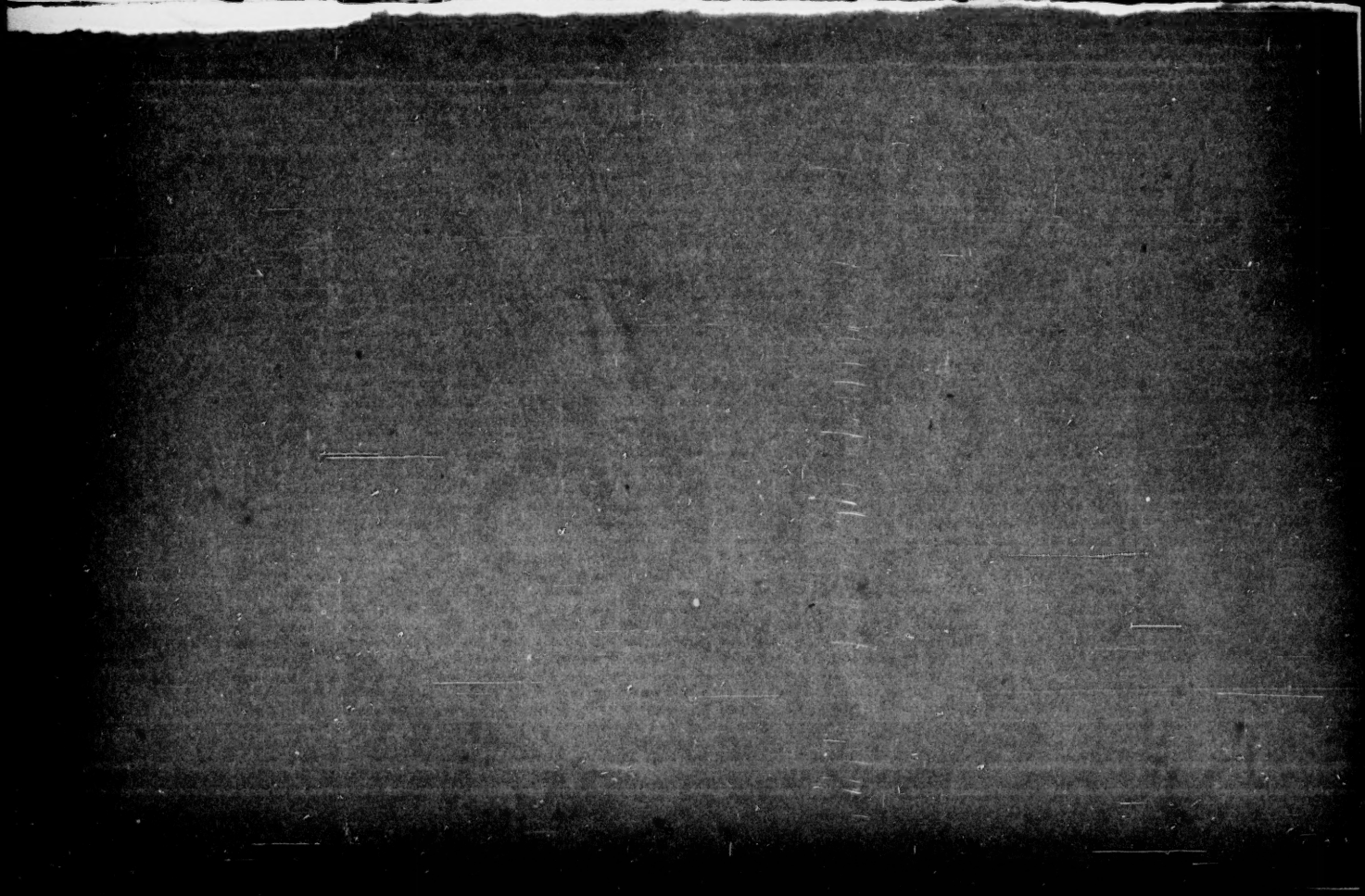
THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

Brief on the Part of the Plaintiff in Error.

JOHN H. MITCHELL,
Attorney for Plaintiff in Error.

McGILL & WALLACE, Law Printers, Washington, D. C.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894

WILLIAM DUNBAR, Plaintiff in Error,
vs.
THE UNITED STATES.
No. 693.

In Error to the District Court of the United States for the District of Oregon.

BRIEF ON PART OF PLAINTIFF IN ERROR.

Statement of Case.

This is a criminal case here on writ of error to the District Court of the United States for the District of Oregon.

Two indictments were presented against William Dunbar, plaintiff in error, in the above-entitled court. One, known in the Record as No. 3420, found under section 2865, U. S. Revised Statutes (Record, 2–6), contained five counts, in each of which the defendant, Dunbar, was charged with the alleged offense of smuggling "*prepared opium*" from the Province of British Columbia, Dominion of Canada, into the State and District of Oregon in the United States.

The alleged contraband "*prepared opium*" mentioned in each count of this indictment is alleged to have been brought in by the defendant on the steamship *Haytien Republic*, as follows:

Count first. July 28, 1892.....	300 pounds
Count second. August 2, 1892.....	800 pounds
Count third. September 2, 1892.....	1,400 pounds
Count fourth. February 22, 1893.....	900 pounds
Count fifth. January 27, 1893.....	1,020 pounds

The defendant was found guilty on but two of these five counts, namely, the third and fourth counts. (Record, 15.)

The second indictment is designated in the Record as No. 3580, found under section 3082, United States Revised Statutes (Record, 6–12), and contains nine counts.

The first five counts of this indictment charged the defendant, Dunbar, with the alleged offense of smuggling into this country, District of Oregon, from the Province of British Columbia, Canada, "*prepared opium*," which, it is averred, was brought in in amounts, in the manner, and at the times following:

Count first. June 4, 1892, on steamship *Wilmington*, 365 pounds.

Count second. July 1, 1892, on steamship *Wilmington*, 300 pounds.

Count third. July 12, 1892, on steamship *Wilmington*, 450 pounds.

Count fourth. October 28, 1892, on steamship *Haytien Republic*, 500 pounds.

Count fifth. November 26, 1892, on steamship *Haytien Republic*, 2,090 pounds. (Record, 6–9.)

The sixth count of this indictment (Record, 9–10) charges the defendant, Dunbar, on the 29th day of

October, 1892, with intent to defraud the revenues of the United States, with willfully, unlawfully, knowingly, and fraudulently concealing in the United States and in the District of Oregon, about 820 pound of "*prepared opium*," subject to a duty of twelve dollars per pound, which opium, it is averred, had been on that date smuggled and clandestinely introduced into the United States from the Province of British Columbia, in the Dominion of Canada, and which had not been invoiced and no duty had been paid thereon. This count was on the trial waived by the Government. (See Charge of Court to Jury, Record, 52.)

The eighth count (Record, 10–11) is in all respects similar to the sixth count, except that the offense is averred to have been committed February 5, 1893, and the amount of opium alleged to have been concealed to be about 200 pounds. This count was also waived by the Government on the trial. (See Charge of Court to Jury, Record, 52.)

The seventh count charges defendant with having on the 29th day of October, 1892, within the jurisdiction of said court, willfully, unlawfully, fraudulently, and knowingly, with intent to defraud the revenues of the United States, facilitated the transportation, after importation, of about 820 pounds of "*prepared opium*," subject to a duty of twelve dollars per pound, and which should have been invoiced, and which "had," on said date, October 29, 1892, "been knowingly, willfully, unlawfully, and fraudulently brought, imported, smuggled, and clandestinely introduced into the United States, and into the District of Oregon, from a foreign country, the Province of British Columbia, Dominion of Canada, and upon which prepared opium no duty had been paid or accounted for." (Record, 10.)

The ninth and final count is substantially similar to the seventh count, except the date of the alleged offense is stated to have been February 5, 1893, and the amount of opium alleged to have been transported, and the transportation of which it is averred defendant facilitated in this country, is averred to have been about 200 pounds. (Record, 11, 12.)

The jury found the defendant guilty on but four of these nine counts, namely, the second, fourth, fifth, and ninth counts. (Record, 15.)

November 27, 1893, the defendant waived arraignment on each of these indictments, and entered his plea of not guilty. (Record, 13.)

On the same date (November 27, 1893), on motion of counsel for the United States, it was ordered by the court below that the two indictments be consolidated. (Record, 13.)

The cause went to trial before a jury November 28, 1893 (Record, 13), and on December 2, 1893, the jury returned the following verdict:

"We, the jury in the above-entitled action, find the defendant guilty as charged in the second, fourth, fifth, and ninth counts in indictment numbered 3580, and we further find the defendant guilty as charged in the third and fourth counts of indictment numbered 3420.

"(Signed) J. M. STAFFORD, *Foreman.*"

(Record, 15.)

It will be seen this verdict eliminates from consideration here the following counts in the two consolidated indictments: First, second, and fifth counts of indictment No. 3420, and counts first, third, sixth, seventh, and eighth of indictment No. 3580.

December 6, 1893, the court, on motion of defendant's counsel, allowed ten days within which to file motion for new trial, which time was December 23, 1893, extended until ten days from that date. (Record, 16.)

January 11, 1894, the following motion for a new trial was filed in said court:

"*Motion for New Trial.*

"Comes now the above-named defendant, William Dunbar, and moves the court to set aside the verdict heretofore entered herein and for a new trial. This motion is made upon the indictment upon which the defendant was tried and the minutes taken by the duly-authorized reporters of the proceedings of the said trial, and is based upon the following grounds, to wit:

First. Insufficiency of the evidence to justify the verdict, and that it is against law.

Second. Insufficiency of the indictment to justify any verdict, and in that the same contained no facts sufficient to constitute a crime.

Third. Insufficiency of each of the counts of said indictment separately considered, upon which counts the defendant was convicted, except the ninth count, to justify any verdict, and in that each of the said counts separately considered, except the said ninth count, does not state facts sufficient to constitute a crime.

Fourth. Because the facts proved to support the averment of said ninth count were also proved to sustain one of the other counts of the said indictment hereinbefore referred to upon which the defendant was by said jury found guilty, and that, by the action of said jury, he was therefore twice found guilty for the commission of acts which can constitute but one offense.

Fifth. Errors in law occurring at the trial and duly excepted to by this defendant, as more fully appears by a reference to the said notes of said reporter extended, and in the bill of exceptions herein.

(Signed) HENRY E. MCGINN and
ALFRED F. SEARS,
Attorneys for Defendant,
William Dunbar."

(Record, 16, 17.)

February 8, 1894, motion for new trial was denied (Record, 18), and on the same date the court below filed in said cause an opinion in support of decision overruling motion for new trial. (Opinion, Record, 18–20.)

February 13, 1894, the court sentenced defendant to pay a fine of $1,000, and to imprisonment in the county jail of Multnomah County, Oregon, for a term of two years. (Record, 20.)

February 15, 1894, on motion of defendant's attorneys, a writ of error was directed to issue, as prayed for, the same to operate as a supersedeas and stay of execution. (Rec., 22, 23.)

February 15, 1894, there was filed in said court an assignment of errors in which 21 errors were assigned. (Record, 23–37.)

Subsequently, March 31, 1894, a bill of exceptions was allowed by the court below and filed in said cause. (Record, 39–57.)

Assignment of Errors.

Twenty-one errors are assigned by counsel in the court below and are to be found in Record, 23–37, inclusive.

These will not be repeated here *in extenso*, but will be taken up in their order and either waived or discussed, as their merits seem to demand.

In addition to the foregoing, the following assignment of errors is now made:

First. Include in the first assignment of error (Record, 23) the ninth count of indictment No. 3580 under section 3082, Revised Statutes.

The first assignment of errors (Record, 23) as amended, *supra*, reads as follows:

"That the matters charged in the indictment under section 2865, Revised Statutes, as to the third and fourth counts thereof, and as to the matters charged in the indictment under section 3082, Revised Statutes, as to the second, fourth, fifth, and ninth counts thereof, do not constitute a crime, either by the common law or under any statute of the United States."

This assignment presents the question as to the sufficiency of these consolidated indictments—and each and every count thereof.

ARGUMENT.

These indictments and each of them are insufficient in this:

1st. In failing to aver that the "opium" alleged to have been smuggled, as in counts 3 and 4, indictment number 3420—found under section 2865, Revised Statutes (Record, 3–4), and counts 2d, 4th, and 5th, indictment number 3580—found under section 3082, Revised Statutes (Record, 7–9), and the transportation of a portion of which it is alleged was facilitated by defendant as, in count 9, indictment number 3082, *supra*, was *prepared for smoking*."

2d. In failing to aver a *scienter* on the part of defendant that the duties had not been paid, and in failing to sufficiently aver the circumstances constituting the alleged offenses.

Point I.

In each and every one of the counts in these two indictments upon which defendant was convicted, it is averred that the merchandise alleged to have been smuggled, and the transportation of which it is averred in one count was facilitated by defendant, was "*prepared opium.*"

It is respectfully submitted that neither the importation into this country from a foreign country nor the transportation within this country after importation of "*prepared opium*" is any offense either at common law, or against any statute of the United States.

It is suggested, not in the body of the indictments, but by a notation on each thereof that they were found, the first, No. 3420, under section 2865 of the Revised Statutes (Record, 6), and the second, No. 3580, under section 3082 of the Revised Statutes. (Record, 12.)

By reference to sections 2865 and 3082, of the Revised Statutes, it will be found that neither opium, nor any other class of goods, wares, or merchandise is designated by name, and the importation of which into this country from a foreign country, without payment of duty, is declared to be an offense.

Section 2865, Revised Statutes, provides:

"If any person knowingly and willfully, with intent to defraud the revenue of the United States, smuggle, or clandestinely introduce into the United States any goods, wares, or merchandise, subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, or shall make out or pass, or attempt to pass, through the custom-house any false * * * invoice, * * * such person, &c., * * * his aiders and abettors, &c., * * * shall be deemed guilty of a misdemeanor, &c." * * *

Section 3082, Revised Statutes, is as follows:

"If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise, after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited, and the offender shall be fined in any sum

not exceeding five thousand dollars, nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both."

We must, therefore, look to the law in other directions for the purpose of ascertaining whether there is a duty of $12, or any other sum, per pound, on what the law has designated as "*prepared opium*," as set out in the indictments.

The only law upon this subject at the date of the commission of the alleged offenses charged in the indictments was the revenue act of October 1, 1890, known as the "McKinley act;" and the only clauses in that act relating to duty on opium imported from foreign countries are paragraphs 47 and 48 of section 1 of that act.

Paragraph 47 reads as follows:

"Opium, aqueous extract of, for medicinal uses, and tincture of, as laudanum, and all other *liquid* preparations of opium, not specially provided for in this act, forty per cent. ad valorem."

While paragraph 48 reads as follows:

"Opium containing *less* than *nine per centum of morphia*, and *opium prepared for smoking*, twelve dollars per pound; but *opium prepared for smoking* and *other preparations* of opium deposited in bonded warehouse shall not be removed therefrom without payment of duties, and such duties shall not be refunded."

Statutes of the United States, 1st Sess., 51st Cong., p. 568.

Another clause in the same act imposing an internal revenue tax upon "*prepared smoking opium* manufactured or found in the United States without stamp" is as follows:

"SEC. 36. That an internal revenue tax of ten dollars per pound shall be levied and collected upon all opium manufactured in the United States *for smoking purposes;* and no person shall engage in such manufacture who is not a citizen of the United States and who has not given the bond required by the Commissioner of Internal Revenue."

Section 38 of the same act (Statutes, *supra*, 621) provides as follows:

"SEC. 38. That all *prepared smoking opium* imported into the United States shall, before removal from the custom-house, be duly stamped in such manner as to denote that the duty thereon has been paid; and that all *opium manufactured in the United States for smoking purposes*, before being removed from the place of manufacture, whether for consumption or storage, shall be duly stamped in such permanent manner as to denote the payment of the internal revenue tax thereon."

While section 40 of the same act provides as follows:

"That a penalty of not more than one thousand dollars, or imprisonment not more than one year, or both, in the discretion of the court, shall be imposed for each and every violation of the preceding sections of this act relating to opium by any person or persons; and all *prepared smoking opium*, wherever found within the United States, without the stamp required by this act, shall be forfeited."

The foregoing provisions as to imported opium are not changed in any respect by the revenue act of 1894, except that the duty is made six dollars instead of twelve dollars per pound on opium containing less than nine per centum of morphia and on opium *prepared for smoking purposes;* while the provisions of the internal revenue portion of the act are not changed in any respect by the revenue act of 1894.

It will be seen, therefore, that "*prepared opium*," as designated in the indictments, and the importation of

which without payment of duty is alleged, is not an article of either "goods, wares, or merchandise" mentioned in either of the sections of the Revised Statutes under which these indictments are presented, or of any section of any other statute, that is subject to any duty whatever by any statute of the United States at the date of the commission of the alleged offenses.

In every section of the statute upon the subject of taxing opium, whether customs tax or internal revenue tax, the language of the law is not "*prepared opium*," as in the indictments, but "*opium prepared for smoking*," as in paragraph 48 of the act, *supra*, upon which an import duty of $12 per pound is imposed; "*opium manufactured in the United States for smoking purposes*," as in section 36 of said act, *supra*; "*all prepared smoking opium*," as in section 38 of the act, *supra*; and "all *prepared smoking opium*," as in section 40; while paragraph 47 of said act imposes a duty of 40 per cent. ad valorem upon aqueous extract of opium for medicinal uses, and tincture of opium, as laudanum, and on all other *liquid preparations* of opium not specially provided for in the act.

Nothing known to the law, therefore, as "*prepared opium*" is made subject to any duty whatever on foreign importation. It is only the *kinds* of opium just specified that are made subject to duty, namely:

1st. "Aqueous extract of opium *for medicinal uses*;"

2d. "Tincture of opium, as laudanum;"

3d. "All other *liquid* preparations of opium not specially provided for in the act;"

4th. "Opium *containing less than nine per centum of morphia*;" and

5th. Opium *prepared for smoking*."

All the foregoing classes and kinds of opium, and *only* these, are subject to a *customs duty* when imported from a foreign country.

While the following—

1st. "Opium manufactured in the United States *for smoking purposes*," not merely "*prepared opium*," is subject to an *internal revenue tax* of ten dollars per pound;

2d. "All *prepared smoking opium*," not merely all "prepared opium" imported into the United States, shall, before removal from the custom-house, be duly stamped, &c.; and

3d. "*All prepared smoking opium*," not merely all "*prepared opium*," wherever found within the United States without stamps, shall be forfeited.

It will be observed, therefore, the same description of the prohibited or taxable article of opium is kept up in the internal revenue portion of the act, as in the customs portion, namely, "opium *for smoking purposes;*" "*prepared smoking opium*;" and not merely "*prepared opium*," as in the consolidated indictments.

Again, by reference to the revenue act of March 3, 1883, Stat. at Large, sec. 2502, it will be found that the different classes or kinds of opium denounced, the importation of which was prohibited or made subject to duty, as in the act of 1890, and the act of 1894, did not include by special designation, what is designated in the indictments in this case as simply "*prepared opium.*" Although, unlike the act of 1890, there was in the act of 1883 a *general clause* making "*all other preparations of opium* not specially enumerated or prescribed for in this act," subject to a duty of ten dollars per pound.

Section 2502, act March 3, 1883, provides as follows:

"Opium, crude, containing nine per cent. and over of morphia, one dollar per pound. The importation of

opium containing less than nine per cent. morphia is hereby prohibited. Opium *prepared for smoking*, and *all other preparations of opium not specially enumerated or prescribed for in this* act, ten dollars per pound; but opium *prepared for smoking*, and *other preparations of opium* deposited in bonded warehouses shall not be removed therefrom for exportation without payment of duties, and such duties shall not be refunded."

"Opium, aqueous extract of, for medicinal uses, and tincture of as laudanum, and *all other liquid preparations* of opium, not specially enumerated or provided for in this act, forty per centum *ad valorem*."

"Morphia or morphine and all salts thereof, one dollar per ounce."

It will, therefore, be observed that the act of 1883 contained a *general clause*, which included within the dutiable list every conceivable kind of *preparations of opium*, whether *liquid* or otherwise, while the act of 1890, under which these indictments were found, does not.

For instance, the clause of act of 1883 relating to *liquid* preparations of opium, and the clause of the act of 1890 relating to *liquid* preparations of opium, are precisely alike in their wording, with the single exception, and this does not change the meaning; that is, the act of 1883 has the words "*enumerated or*," while the act of 1890 has not, as follows:

CLAUSE, ACT 1883.

"Opium, aqueous extract of, for medicinal uses, and tincture of, as laudanum, and all other *liquid* preparations of opium, not specially *enumerated or* provided for in this act, forty per centum ad valorem." Sec. 2502, act March 3, 1883.

CLAUSE, ACT 1890.

"Opium, aqueous extract of, for medicinal uses, and tincture of, as laudanum, and all other *liquid* preparations of opium not specially provided for in this act, forty per centum ad valorem." Paragraph 47, act 1890.

Each of these acts, therefore, includes within the dutiable list at rate forty per centum ad valorem every conceivable kind of *liquid* opium *preparations* for whatever purpose *prepared* or *used*.

But a comparison of the *other* clauses of the two acts discloses at a glance a wide difference. While the act of 1883 makes dutiable, not only crude opium, containing nine per centum *and over* of morphia, at one dollar per pound, not only *prohibits* the importation of opium containing *less* than nine per cent. of morphia; not only imposes a duty of ten dollars per pound on "*opium prepared for smoking*," but, in addition to all this, imposes a like duty of ten dollars per pound on "*all other preparations of opium not specially enumerated or prescribed for*," in the act; whereas, the act of 1890, after passing from *liquid* preparations, simply imposes a duty of twelve dollars per pound on "opium containing less than nine per centum of morphia," and on "opium *prepared for smoking*," omitting from its dutiable and prohibitory provisions the following descriptions of opium, which are either made dutiable, or their importation prohibited by the act of 1883:

1st. "Opium crude, containing nine per cent. and over of morphia.

2d. "*All other preparations of opium*, not specially enumerated or prescribed for in this act."

The Act of 1883 includes, in addition to *liquid* preparations, the following:

1. "Opium, crude, containing nine per cent. *and over* of morphia."
2. "Opium containing *less* than nine per cent. of morphia."
3. "Opium *prepared for smoking*;" and
4. "*All other preparations of opium* not specially enumerated or prescribed for in the Act.

The Act of 1890 includes, in addition to *liquid* preparations, the following *only*:

1. "Opium containing less than nine per cent. of morphia;" and
2. "Opium *prepared for smoking*."

It follows, conclusively, that either through mistake or otherwise—and whether unintentionally or otherwise, it is quite immaterial so far as the question now under consideration is concerned—the Act of 1890 omits

from its dutiable and prohibited list all "*prepared opium*"—as the indictments have it, all "*preparations of opium*"—of whatever nature, or for whatever purpose used, save and except—

1. All *liquid* preparations;

2. All opium *containing less than nine per cent. of morphia;* and

3. Opium *prepared for smoking.*

No one of these is described in these indictments, therefore there is no offense charged.

Nor will it do, for one moment, to contend that these three kinds of opium include *all* the kinds of opium known to commerce; nor will it do to say that the designations, "all *liquid preparations* of opium and opium *prepared for smoking*," include *all* the different kinds of "*prepared opium*" known to commerce. Nor is "*for smoking*" by any means the only use for which opium, other than liquid, is prepared or used. Upon the contrary, the principal use is *for medicine.* Webster, in his unabriged, in defining opium as an article of commerce, quotes from Brande, Ure, as follows:

"Opium, as first obtained, flows from incisions made in the capsules of the plant white poppy, and the best flows from the first incisions. It is imported into Europe and America chiefly from the Levant, in *cakes* or *masses* weighing from eight ounces to a pound. It is heavy, of a dense texture, of a brownish-yellow color, not perfectly dry, and easy receiving an impression from the finger. It has a faint smell, and its taste is bitter and acrid. *It is of great use as a medicine.*"

The failure, therefore, to aver in the indictments under consideration that the opium or "*prepared opium*" alleged to have been smuggled was opium "*prepared for smoking*," is not merely a "defect or imperfection

in matter of form only," which does "not tend to the prejudice of the defendant," which is cured by section 1025 of the Revised Statutes. This omission is much more than that: it is more than a mere *defect* or *imperfection in form*—it is an omission, a defect, an imperfection in matter of *substance*—it is a failure to plead a statutory definition of crime, or of the article, rather, which is, by statute, made the subject of crime, and in its stead substituting an article not recognized by the Statute.

As a proper test, therefore, as to whether the averment "*prepared opium*" * * * subject to a duty by law, to wit, to a duty of twelve dollars ($12) per pound," as in the indictment, is equivalent to an averment "*opium prepared for smoking* * * * subject to a duty by law, to wit, to a duty of twelve dollars per pound," as in the statute prescribed, it is pertinent to inquire whether there is not recognized, not only by commerce, but by the *statute*, a certain "*prepared opium*" which is *not* intended or used "for smoking," and which is prepared, intended, and used for something else? That this is so is clearly apparent from the express terms of the act. It is manifestly apparent from the terms of the act that *a* preparation, *any* preparation of opium which contains nine per centum or *more* of morphia, which is not a *liquid* preparation, and which is not "*for smoking*," may be admitted into this country from any foreign country free of duty under the law *as it existed* at the date of the alleged offenses specified in the indictment. It may be admitted as medicine. The fact that the statute imposes a duty on a preparation of opium *containing less than nine per centum of morphia*, and on "opium *prepared for smoking*," and on *all liquid* preparations of opium, leaves the clear inference that there are other *preparations of opium* besides these.

Again, paragraph 48 of the act of 1890 clearly recognizes the fact that there are *other* preparations of opium that are dutiable besides those prepared "for smoking."

The paragraph concludes, "but opium prepared for smoking and *other preparations of opium* deposited in bonded warehouse shall not be removed therefrom without payment of duties," &c.

Surely it can not be successfully contended that the following averment in the indictments, "subject to a duty, to wit, to a duty of twelve dollars ($12) per pound," can supply the deficiency in such indictments in designating, describing, or *defining* the inhibited or taxable article.

"The clause defining an offense cannot be enlarged by the clause imposing the penalty."

Sedgw. Const. and Stat. Constr., 279, and notes; Elias *v.* Nottingham, 8 E. and B., 698.

There are five kinds of "prepared opium" or "preparations of opium" clearly recognized by the act of 1890, *four* kinds of which are dutiable at different rates, and *one* kind of which is admitted free of all duty, as follows:

1st. All *liquid* preparations specified in the act, such as aqueous extract of, for medicinal uses, and tincture of, as laudanum, on which there is a duty of forty per centum *ad valorem*.

2d. All other *liquid* preparations of opium, not specially provided for in the act, on which there is a like duty of forty per centum *ad valorem*.

3d. Preparations of opium *containing less than nine per centum of morphia*, subject to a duty of twelve dollars per pound.

4th. *Preparations of opium* containing nine per centum *or more* of morphia, and which are *not liquid*, or for *smoking purposes*, upon which there is *no duty whatever;* and—

5th. "Opium *prepared for smoking*," subject to a duty of twelve dollars per pound.

It can not be successfully claimed, therefore, that "prepared opium" *is a designation of an article of commerce*, known to commerce specially as an article used for smoking, when the statute recognizes affirmatively the fact that there are various kinds of "*prepared opium*," both *liquid* and *solid*, *not* used for smoking, and which are prepared, intended for, and used for *other* purposes than smoking.

The fact that the descriptive words, "for smoking," are words added to the words, "opium prepared," as an essential part of description or definition of the inhibited or taxed article, carries with it the conclusive inference that there are recognized by commerce, and by the statute, "preparations of opium," or to use the precise language of the statute, "*opium prepared*," or as the indictments have it, "*prepared opium*," that are *not* "*for smoking*," or "*for smoking purposes.*"

Suppose the alleged offense charged in the indictment had been for smuggling opium *containing less than nine per centum of morphia*, which is, under the statute, subject to precisely the same duty—$12 per pound—as opium *prepared for smoking*, would an indictment be sufficient which merely averred that the defendant smuggled into this country from a foreign country "opium * * * subject to a duty by law, to wit, to a duty of twelve dollars per pound," without an averment to the effect that it "*contained less than nine per centum of morphia?*" Moss assuredly not. The Government will

scarcely contend to the contrary, and yet it is most difficult to draw any distinction between the cases. The descriptive words, "*for smoking*," in the one case, are no less an essential part of the designated article, no less an essential part of the *definition* of the *taxable article* than the descriptive words, "*containing less than nine per centum of morphia*," in the other case.

Point II.

The indictments are insufficient in failing to aver that the defendant *knew* that the alleged duty on the opium had not been paid.

This court held in case of the United States *v.* Carll (105 U. S., 612), that in "an indictment under a statute it is not sufficient to merely set forth the alleged offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes of like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent. United States *v.* Cruikshank, 92 U. S., 542; United States *v.* Simmons, 96 U. S., 360; Commonwealth *v.* Clifford, 8 Cush., 215; Commonwealth *v.* Bean, 11 Cush., 414; Commonwealth *v.* Bean, 14 Gray, 52; Commonwealth *v.* Filburn, 119 Mass., 297."

This much section 3082, Rev. Stat., under which indictment number 3580 (Record, 6–12) was found, clearly does not do. The Government will scarcely contend that it does. This act simply declares: "If any person shall fraudulently or knowingly import or bring into

the United States, or assist in so doing, any merchandise, contrary to law, *or* shall * * * facilitate the transportation * * * of such merchandise after importation, knowing the same to have been imported contrary to law, * * * the offender shall be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both." And in view of what shall be presently stated, it is quite clear that the incorporation of the words "*smuggle*" and "*clandestinely introduce*," in section 2865, Rev. Stats., which are omitted in section 3082, Rev. Stats., does not, of themselves, in the language of this court in United States *v.* Carll, 105 U. S., *supra*, "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence *intended to be punished.*"

Assuming, therefore, that the indictments, to be sufficient, must do more than merely follow the words of the statute, we will inquire: 1st. Do they follow the words of the statute? They clearly do not, as has already been shown, by failing to aver that the opium imported was "*prepared for smoking;*" and 2d. Do they sufficiently, by the use of proper terms and averments *aliunde* the statute, define the specific offence and connect the defendant with it?

The case of United States *v.* Carll was an indictment under section 5431 of the Revised Statutes, which enacts that—

"Every person who, with intent to defraud, passes, utters, publishes, or sells any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be punished by a fine of not more than five thousand dollars, and by imprisonment at hard labor not more than fifteen years."

Each count of the indictment alleges that the defendant, at a certain time and place, "feloniously, and with intent to defraud the Bank of the Metropolis, which said bank is a corporation organized under the laws of the State of New York, did pass, utter, and publish upon and to the said Bank of Metropolis a falsely made, forged, counterfeited, and altered obligation and security of the United States" (which was set forth according to its tenor), "against the peace, and contrary to the form of the statute."

The case came up on a division of opinion between Judges Blatchford and Benedict, the question being—

"Whether the indictment, setting forth the offense in the language of the statute, without further alleging that the defendant *knew* the instruments to be false, forged, counterfeited, and altered, was sufficient, after verdict, to warrant judgment thereon."

The court further said (opinion by Mr. Justice Gray):

"This indictment, by omitting the allegation contained in the indictment in United States *v.* Howell (11 Wall., 432), and in all approved precedents, that the defendant knew the instrument which he uttered to be false, forged, and counterfeit, fails to charge him with any crime. The omission is of matter of substance, and not a 'defect or imperfection in matter of form only,' within the meaning of section 1025 of the Revised Statutes. By the settled rules of criminal pleading, and the authorities above cited, therefore, the question of the sufficiency of the indictment must be *answered in the negative*."

In none of the three counts, 2d, 4th, and 5th, of indictment No. 3580, and counts 3 and 4, indictment No. 3420—on which defendant was found guilty—is there any averment of *knowledge* on his part that the duty had not been paid on the opium alleged to have been imported. We will first consider indictment No. 3580.

This indictment, it is true, does in these three counts aver that the defendant did, with intent to defraud the revenues, "wilfully, unlawfully, knowingly, and fraudulently import, bring, smuggle, and clandestinely introduce into the United States * * * certain goods, wares, and merchandise, to wit: * * * about —— pounds of prepared opium, * * * subject to a duty by law, to wit, to a duty of twelve dollars per pound, * * * without paying or accounting f r said duty, or any part thereof, * * *" but there is no averment that the defendant *had knowledge* of the fact that such duty had not been paid.

Knowledge upon the part of the defendant, that the ***duty*** had not been paid, is, it is respectfully insisted, an *absolutely essential element* in this offense; and it must be *distinctly* and *expressly* averred, and can not be *inferred* from any of the averments, or all of them together, contained in the indictments. The defendant *may* have been guilty of everything charged in the indictment; he may have wilfully, unlawfully, knowingly, and fraudulently, with intent to defraud the revenues of the United States, imported, brought, smuggled, and clandestinely introduced into the United States, "prepared opium," or even "opium *prepared for smoking*," subject to a duty, and without "paying or accounting for said duty," and yet be entirely innocent of the offense sought to be fastened on him by these indictments.

There are *other* offenses against the revenue laws of the United States of which the smuggler may be guilty—by smuggling—bringing into this country merchandise and opium contrary to law, upon which the duty *has been paid*. For instance, the purchaser—the importer—may be acting in perfect good faith—may have paid the duty—and yet the carrier—the shipmaster—the agent—in order and with intent to evade and defraud the revenue

laws, as to invoices, as prescribed in section 2865, Revised Statutes, and other shipping regulations, may be guilty of "*smuggling*" and "*clandestinely introducing*" into this country such opium, and yet the duty may have been paid. But again, the purchaser—the importer—may have wilfully and wrongfully failed, or omitted to pay the duty; this fact may not be known to the carrier—the master—or the owner of the vessel; in fact, he may believe that the duty has been paid, and, therefore, he may not be under any obligation in law or morals to pay such duty, or account for the same, and yet such carrier, master, or owner of the vessel on which such opium is imported—and all this opium is alleged to have been imported upon two certain steamships, the *Haytien Republic* and the *Wilmington*—may be guilty of the offense of *smuggling* in bringing such opium into the United States; *another* and *different* offense, however, from that attempted to be charged in the indictment, namely:

1. By wilfully, knowingly, and fraudulently failing to have such opium, or any part thereof, invoiced;

2. Without having it included in the manifest of the cargo of the steamship; or

3. Without passing the packages containing such opium through the custom-house, or submitting the same to the officers of the revenues for examination.

What has just been stated applies equally to counts 3 and 4, indictment number 3420.

Count 9 in indictment 3580 will be considered further later on.

There being, therefore, more than one offense recognized by the statutes, and also by these indictments, one in which the failure alone to pay duty on merchandise imported, is the *gravamen*, in which event an averment

that the accused *knew* such duty was not paid, is an essential element, and must be distinctly alleged; and another, the *gravamen* of which consists in a violation of shipping laws and regulations, and which may exist whether duty has been paid or not, and for which an offender may be indicted under section 2865, *supra*, Revised Statutes, which inveighs against "fraudulently or knowingly importing or bringing into the United States any merchandise contrary to law. It is absolutely essential to the proper protection of the rights of the accused—in order that he, in the language of the VII. Article of the Constitution of the United States—"shall enjoy the right * * * to be informed of the '*nature*' and '*cause*' of the accusation," against him; that if the intention is to charge the defendant with smuggling, by evading the payment of duty, then there should be a distinct averment that he *knew* the duty was not paid.

Additional Authorities as to Insufficiency of the Indictments.

The Constitutional Right.

The meaning of the VI. Amendment to the Constitution was stated by this court, and the authorities cited, in case United States *v.* Cruikshank, 92 U. S., 557–8 (opinion by the late Chief Justice Waite, in part), as follows:

"In criminal cases prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' (Amend. VI.) In United States *v.* Mills, 7 Pet., 142, this was construed to mean that the indictment must set forth the offence 'with clearness, and all necessary *certainty*, to apprise the accused of the crime with which he stands charged;' and in United States *v.* Cook,

17 Wall., that 'every ingredient of which the offence is composed must be accurately and clearly alleged.' * * "

This court, in United States *v.* Simmons, 96 U. S., 362, held (opinion by Mr. Justice Harlan), that an indictment following the words of section 3266 of the Revised Statutes, as follows, "did knowingly and unlawfully cause and procure to be used a still, boiler, and other vessel, for the purpose of distilling," &c., was insufficient—in that it should have averred the name of the person whom he procured to use the same; and this upon the ground that the accused must be apprised by the indictment with *reasonable certainty* of the *nature* and *cause* of the accusation against him.

In Commonwealth *v.* Filburn, 119 Mass., 298, an indictment was had under a section of the Massachusetts statute which provided punishment for any person who "aids or assists a prisoner in escaping, or attempting to escape, from an officer or person who has the lawful custody of such prisoner."

The court held it did not belong to that class of statutes as to which it has been held that an indictment is sufficient which follows the words of the statute, and said:

"Construing it in the light of well-known principles of the criminal law, there is no difficulty in ascertaining the intention of the Legislature. But the language used does not, *ex vi termini*, describe *all* the ingredients of the offence intended to be punished with the *certainty* required in criminal pleading. An indictment under it, therefore, must allege all the facts necessary to bring the case within the intent and meaning of the statute. Commonwealth *v.* Barrett, 108 Mass., 302, and cases cited."

Commonwealth *v.* Filburn, 119 Mass., 297.

The case of Commonwealth *v.* Bean, 11 Cushing, 414, is directly in point as to the sufficiency of this in-

dictment. The statute made it a misdemeanor on the part of any person who shall "maliciously or wantonly break the glass, or any part of it, in any building not his own," etc.

The indictment averred that the defendant, "with force and arms, wilfully, maliciously, wantonly, and without cause, did break and destroy the glass, to wit, two panes of glass of the value of ten cents each, in a certain building there situate, not his own, but which building then and there belonged to, and was the property of, one Dorcas B. Prentice," etc.

After a verdict of guilty the defendant moved an arrest of judgment, "because the indictment did not allege that the glass broken was a *part* of the building, but only that it was *in* a building not his own."

The court, Metcalf, Justice, sustained the motion, and after citing 2 Hawk., c. 25, sec. 111; Commonwealth *v.* Slack, 19 Pick., 304; Commonwealth *v.* Clifford, 8 Cush., 215; Com. *v.* Stout, 7 B. Monroe, 247, said:

"We are therefore of the opinion that the indictment in this case will not sustain a judgment against the defendant. For aught that the indictment shows, the glass, which he is charged with having maliciously and wantonly broken, may have been panes of glass which were not a part of any building."

"*Scienter*, when necessary to be alleged in an indictment, is matter of *substance*, and not of *form*, and its omission is not cured by section 1025 of the Revised Statutes."

United States *v.* Slenker, 32 Fed. Rep., 691;
Commonwealth *v.* Boynton, 12 Cush., 499.

The rule as to the test of sufficiency of an indictment is well stated by the court in Commonwealth *v.* Young, 15 Grat., 664, thus:

"If the indictment *may* be true, and still the accused *may* not be guilty of the offense described in the statute, the indictment is insufficient."

Mr. Chitty, in his Criminal Law, vol. 1, p. 281, says:

"It is a general rule that all indictments upon statutes, especially the most penal, must state all the circumstances which constitute the definition of the offense in the act, so as to bring the defendant precisely within it."

On page 283, he says:

"It is in general necessary not only to set forth on the record all the circumstances which make up the statutable definition of the offense, but also to pursue the precise and technical language in which they are expressed."

"The indictment should always contain such a specification of acts and descriptive circumstances as will upon its face fix and determine the identity of the offense, and enable the court by an inspection of the record alone to determine, whether admitting the truth of the specific acts charged, the thing has been done which is forbidden by law."

Hill's Notes to Oregon Code, p. 768;
State *v.* Dougherty, 4 Oreg., 200;
People *v.* Potter, 35 Cal., 110;
Frisbie *v.* State, 1 Oreg., 248;
People *v.* Phipps, 39 Cal., 326–353;
State *v.* Carr, 6 Oreg., 133;
State *v.* Ah Sam, 14 *id.*, 437;
People *v.* Dolan, 9 Cal., 576;
People *v.* Rodriguez, 10 *id.*, 50;
People *v.* Ah Woo, 28 *id.*, 205;
People *v.* Murphy, 39 *id.*, 52;
People *v.* Doty, 5 Oreg., 491.

Construction of Penal Statutes.

The rule of construction of penal laws as laid down by Chief-Justice Marshall in the case of the United States *v.* Wilterberger (5 Wheat., 95, *supra*), I believe has been adhered to substantially by this court ever since. It is as follows:

"The rule that penal laws are to be construed strictly is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, and not the courts, which is to define a crime, and ordain its punishment."

And further—

"It is said that notwithstanding this rule, the intention of the law-maker must govern in the construction of penal as well as other statutes. This is true. But this is not a new, independent rule, which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. * * To determine that a case is within the intention of the statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute because it is of equal atrocity, or of kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases."

Chief-Justice Marshall, in 5 Wheat., *supra*, in applying this rule of construction to the facts of that case, said:

"In this section, as in the preceding, had the words, 'upon the high seas,' been omitted, the construction would have been that which, according to the argument of the United States, it ought now to be. But these words are sensible and are mentioned. They constitute the description of the place which the legislature has chosen to give us, and courts can not safely vary that description without some sure guide to direct their way. * * *"

And further—

"* * * To manslaughter, the principal crime, the right to punish, which depends on the place in which it is committed, Congress has annexed *a description of place*. To the other crimes enumerated in the same section, which are acessorial in their nature, and some of which may be committed anywhere, Congress has annexed *no* description of place. The conviction seems irresistible that Congress has not in this section inserted the limitation of place inadvertently, and the distinction which the legislature has taken must of course be respected by the court."

United States *v.* Hartwell, 6 Wall., 385.

So here in the case now under consideration Congress saw proper in defining the opium upon which there should be a customs duty of $12 per pound, not merely as "prepared opium," as in the indictments, but as "opium prepared *for smoking*," as in the statute. And the distinction which the Congress has made "must," in the language of Chief-Justice Marshall, "of course be respected by the court."

In United States *v.* Morris, 14 Pet., 46, Chief-Justice Taney reiterated substantially the statement of Chief-Justice Marshall, in 5 Wheat., as follows:

"In expounding a penal statute the court will certainly not extend it beyond the plain meaning of its words; for it has long been well settled that such statutes must be strictly construed. Yet the evident intention of the Legislature ought not to be defeated by a forced and over-strict construction."

The same doctrine was invoked by Mr. Justice Harlan, of this court, as lately as in the case *In re* Coy, 31 Fed. Rep., 800, the court quoting and approving the utterances, *supra*, of both Chief-Justice Marshall and Chief-Justice Taney.

The rule is that penal statutes are to be construed strictly against the State, and in favor of the accused; but the words must be given their full meaning, and the courts will not strain the context and look after a meaning which may have the effect of declaring the statute of no effect. (Clark's Criminal Law, 28; United States *v.* Wiltberger, 5 Wheat., 76; United States *v.* Morris, 14 Pet., 475; United States *v.* Hartwell, 6 Wall., 385; Gibbons *v.* People, 33 Ill., 443; People *v.* Riley, 5 Mich., 384; *In re* McDonnough, 49 Fed. Rep., 360.)

In People *v.* Streilly, 50 Mich., , the court said:

"It is a safe and necessary rule to construe criminal statutes so as to include what is fairly and reasonably within the legitimate scope of the language, but not to include what is not within the language, merely because it partakes of similar mischievous qualities.

In re McDonnough, 49 Fed. Rep., 360;
People *v.* Reynolds, 71 Mich., 343.

The rule of strict construction only applies to that portion of the statute which *defines the offense* and prescribes the punishment.

Clark's Criminal Law, 28.

"Where a statute creates an offense and expressly provides a punishment, the statutory provisions must be followed *strictly* and *exactly*, and only the statutory penalty can be imposed."

Wharton's Criminal Law, vol. 1, sec. 25; *In re* Wright, 1 Burr, 543; People *v.* Stevens, 13 Wend., 341; People *v.* Hislop, 77 N. Y., 331.

It is a sound rule of construction that every clause and word of a statute shall be presumed to have been intended to have some force and effect.

Opinion of the Justices of the Supreme Court of Massachusetts, 22 Pick., 575.
Hotchen *v.* Noble, 4 Black., 148;
People *v.* Plumstead *et al.*, 2 Mich., 470;
State *v.* , 21 Neb., 599.

This court, in case Washington Market Co. *v.* Hoffman, 101 U. S., 112, said:

"It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word, and that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each."

Judge Dillon, in the case of The State *v.* Lowell, 23 Iowa, 304, said:

"Criminal statutes are inelastic, and cannot be made to embrace cases plainly without the letter though within the reason and policy of the law."

Bishop, Criminal Law.

In the case of the United States *v.* Seventy-Eight Cases of Books, 2 Bond's Rep., Circuit and District Court, Southern District of Ohio, 272, the court said:

"This information is based upon section 66 of the act of March 3, 1799, which provides 'that if goods, wares, or merchandise of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof *at the place of exportation* with design to evade the duties thereon, or any part thereof, all such goods, wares, or merchandise, or the value thereof, shall be forfeited.'

"It is objected to this information that it is defective in not averring that the alleged false and fraudulent invoice of the books was below their actual cost *at the*

place of exportation. The averment is, that they were invoiced below their actual cost, but it is not averred that it was below their actual cost *at the place of exportation.* Whether such an averment is not necessary to sustain the information is the question to be determined. While the courts of the United States, in administering the navigation and revenue laws, have been uniformly liberal in their practice, and in their construction of statutes on these subjects, I can find no case in which they have held that an information, which did not prescribe substantially the *statutory offense* on which a forfeiture was claimed, could be sustained. The case of the schooner *Hoppet* and Cargo, 7 Cranch., 389 (2 Pet., 542), and the case of the *Nancy* (1 Gallison, 67), have a direct bearing on this subject."

In the above case, the court will observe the law simply declared a forfeiture of the goods wrongfully imported, and did not make it a misdemeanor or felony, subject to fine and imprisonment, and yet the court held in that case very properly that while the strict rule of construction applicable to a penal statute should not be applied, that still the information to be good must substantially describe the statutory offense on which the forfeiture was claimed.

And notwithstanding the intimation in the foregoing case that the statutes involving the revenue laws should be construed liberally, it is held by the following authorities, and many others, that statutes concerning forfeitures should be construed strictly:

Von Schmidt *v.* Huntington, 1 Cal., 71;
Souter *v.* Seawich, 1 Cal., 163;
Gibson *v.* Jenny, 15 Mass., 205;
Chamberlin *v.* Bell, 7 Cal., 294.

"General words in the construction of statutes are controlled by specific exceptions."
Lucas *v.* Payne, 7 Cal., 96.

Where statutes make use of words and phrases of a well-known and definite sense in the law they are to be received and expounded in the same sense in the statute.

United States *v.* Reynolds, 13 Cal., 518;
United States *v.* McGill, 1 Wash., 463;
Adams *v.* Turrentine, 8 Ired., 149;
People *v.* Eddy, 43 Cal., 332;
Ex parte A. Vincent, 26 Ala., 145;
State *v.* Smith, 5 Humphrey, 396;
Cole *v.* Quinney, 1 Oreg., 364.

"Opium prepared for smoking," is a phrase of a well-known and definite sense, while "*prepared opium*" has no well-known and definite sense, as there are many kinds and uses of such preparations, both liquid and otherwise.

In addition to the definition of opium cited from Webster's Dictionary, *supra*, attention is attracted to the following:

In "The British Pharmocopœia of 1885," published under the direction of The General Council of Medical Education and Registration of the United Kingdom, pursuant to the acts XXV and XXVI, Victoria, 1862, may be found the following list of "*opium preparations*," used medicinally:

1st, extract of opium; 2d, confection of opium; 3d, opium powder or powered opium; 4th, liquid opium; 5th, enema of opium; 6th, tincture of opium; 7th, compound powder of opium; and 8th, ammoniated tincture of opium. Extract of opium is a preparation composed of one pound of opium and six pints of distilled water. This extract yields about 20 per cent. of morphia.

Again, in Wood, Remington, and Sadtler's United States Dispensatory, 16th edition, published in 1883, and the first edition of which was issued sixty-one years

ago, pages 1098–1124, may be found a most elaborate and interesting statement, not only of the different kinds of opium, the various preparations of opium, but of the different uses for which prepared, as for medicines for various diseases, for mixing various compounds, for eating, and for smoking.

In a note, page 1101, is the following: "The great importance of opium renders it desirable that all its *commercial varieties* should be accurately described;" then follows a list of nineteen different varieties, differing in kind, form, manner of preparation, and use.

On page 1122 of this work is this statement: "The use of opium as a medicine can be clearly traced back to Diagoras, who was nearly contemporary with Hippocrates; and it was probably employed before his time." And again: "Opium may be administered in *substance* or *tincture*. In the former shape it is given in the shape of a pill which is formed out of "powdered opium." * * "Many nations of the East smoke opium, as those of the West smoke tobacco." (Page 1122, work, *supra.*)

The preparation known to commerce as "*powdered opium*" contains generally about 14 per centum of morphia. (Page 1124, work, *supra.*) It is, therefore, a *prepared opium*, or a "*preparation of opium*," the importation of which is not prohibited, nor is it subject to any customs duty, and it is imported largely into this country.

The foregoing is clearly explanatory of the reason why Congress in each case described in terms the *kind of opium* on which a particular duty was imposed.

"We are undoubtedly bound," says Mr. Justice Story, "to construe penal statutes strictly, and not to extend them beyond their obvious meaning by strained inferences; on the other hand, we are equally bound to interpret them according to the manifest import of the words, and to hold all cases which are within the words and

the mischief to be within the remedial influence of the statute."

Sedgwick, 283.

The case of Souter *v.* Seawich, 1 Cal., 163, was a proceeding under an act entitled "An act for the collection of demands against vessels and boats." The first section enacted that "every boat and vessel used in navigating the waters of this State shall be liable to be proceeded against by attachment," &c.

The *Seawich* belonged to the port of New York, and was a transient ship, but was then in the harbor of San Francisco. She was in this way then used in navigating the waters of that State, and the question was whether she was of that class designated by the act. The court said no, and in construing the foregoing statute, said:

"If a ship, whose employment is on the high seas, because she enters the harbor of San Francisco is to be considered as belonging to the description of vessels mentioned in the statute, then every vessel that may have cause to be found upon waters within the territorial limits of the State must be embraced within the meaning of the act. But such construction would under the words '*used in navigating the waters of this State*' be senseless and nugatory. The meaning of the statute would be the same without them as with them. If the legislature had intended that the provisions of the statute should be extended to such a case as the present, they would have said in general terms that every boat and vessel found upon the waters of this State should be liable, without using the *restrictive language* which they have employed. We see no possible way in which any force or effect can be given to the clause under consideration, '*used in navigating the waters of this State*,' if the statute can be extended to this case. It is, however, a well-settled rule of interpretation, that a statute must be construed so as to give effect and meaning, if possible, *to every clause and word*."

Souter *v.* Seawich, 1 Cal., 163.

So in the case now before the court, if The Congress had intended that the clause should include opium, however prepared, except *liquid* opium, and opium *containing less than nine per cent. of morphia*, these having been provided for in preceding sections, they would have simply said "all prepared opium, except as hereinbefore specified," instead of "opium *prepared for smoking*." There must be some meaning, some force, some effect given to the words "*prepared for smoking*." These words "*for smoking*" would never have been inserted if Congress had not intended to restrict the inhibition not merely to certain *prepared* opium, but to a *particular kind* of prepared opium, namely, *opium prepared for smoking*.

Souter *v.* Seawich, 1 Cal., 164;
Cheaver *v.* Hays, 3 *id.*, 473.

It is a sound principle that such a construction ought to be put upon a statute as may best answer the intention which the law-makers had in view, and that is sometimes to be collected *from the cause and necessity of making it;* at other times from other circumstances.

Sedg. Const. and Stat. Law, 232;
Keith *v.* Quinney, 1 Oreg., 366;
State of Oregon *v.* Carr, 6 Oreg., 136;
Platt *v.* Union Pac. R. R. Co., 99 U. S. 48.

What was the evil then sought to be prevented by Congress when a prohibitory duty of $12 per pound was placed on certain kinds of prepared opium? What was the cause or necessity of such legislation? What the evil sought to be suppressed? Clearly the evil of smoking opium. The fact that this had become in this country, through Chinese influence, a prevalent vice, in all large cities, of hideous mien and ruinous effect, was the cause, the necessity, for such legislation, and

hence it was, not merely prepared opium, but opium prepared *for smoking*, upon which this prohibitory duty was imposed.

In the case of the State of Oregon *v.* Carr, *supra*, the Supreme Court of that State said :

"This act was passed to prevent and punish gambling. A law should never be so construed as to defeat its intent (Smith on Construction of Statutes, p. 671, section 527)."

So here the purpose in placing a prohibitory customs duty on opium "*prepared for smoking*" was to crush out the vice of opium smoking in this country.

"In construing statutes courts will give them such a construction as will carry out the intention of the legislature, where that intention is obvious, and where it is practicable to do so. That intent is to be gathered from a view of the whole statute ; by comparing one portion with another—the text with the context; by considering the occasion and the necessity of the law—the mischief felt and the remedy sought—these may all be brought into requisition in arriving at the intention of the lawgiver, where the language he has made use of is doubtful or ambiguous."

Coke's Inst., vol. 1, pp. 30–32;
Plow. Com., 57, 205, 464;
Datchus *v.* Esty *et al.*, 19 Vt., 139;
United States *v.* Fisher, 2 Cranch, 358;
United States *v.* Freeman, 3 How., 556;
People *v.* Plumstead *et al.*, 2 Mich., 468.

But where the language is clear and explicit, where it is free from every doubt, no other than the literal construction should be given to it.

Authorities, *supra.*

"Where the meaning of a statute is plain, it is the duty of the courts to enforce it according to its obvious terms. In such a case there is no necessity for construction."

Thornley *v.* United States, 113 U. S., 310.

In the case at bar the language is clear and explicit as to the definition of the inhibited article. It is "opium *prepared for smoking*," not simply "*prepared opium*," as in these indictments, leaving it to conjecture as to what *kind of prepared opium*—whether prepared opium "*containing less than nine per centum of morphia*," upon which there is a like duty as on "opium *prepared for smoking*," and in which event the averment that it was subject to a duty of $12 per pound, even could it be considered at all in defining the offense, could not possibly throw any light on the question, or whether it is a *liquid* preparation, on which there is a duty of 40 per cent. *ad valorem*, or a preparation *containing nine per centum and more of morphia*, upon which there is *no duty at all*—therefore the literal construction should be given it.

"It is a well-settled general rule that in an indictment for an offense created by statute it is sufficient to describe the offense in the words of the statute, and this position is undoubtedly correct as a general rule. The question whether the offense is described in the words of the statute includes the question whether the acts constituting the crime are stated with 'the circumstances that are necessary to constitute a complete crime.'"

State of Oregon *v.* Packard, 4 Oreg., 160;
Oregon Criminal Code, sections 69, 72.

But in the case at bar the indictments neither follow the words of the statute in their description of the offense, nor do they state the circumstances that are necessary to constitute a complete crime, and this is true of every count in the two indictments.

The question here presented is, in the view the writer of this brief takes of this indictment, not so much, to quote the language of this court in the case of The United States *v.* Cruikshank *et al.*, 92 U. S., 557,

"whether it is enough, in general, to describe a statutory offense in the language of the statute, but whether the offense has here been described at all."

The statutory offense here defined is the unlawfully importing into this country without paying duty and with intent to defraud the Government "opium prepared for smoking," whereas the indictment accuses the defendant of smuggling "prepared opium," an article which may or not have been prepared for smoking, which may or may not be intended or fit for such use. Therefore the offense described by the statute has not been described at all.

"The offense must be within both the spirit and the letter of the law."

Sedgw. Const. and Stat. Constr., 279, and notes;
Lair *v.* Killmer, 1 Dutch, 522.

The rule as to the sufficiency of an indictment for a misdemeanor or felony is, under the codes of the several States, and the more modern practice, and where the State constitutions, as in Oregon and most States, have a provision similar to the VII. amendment, substantially that laid down by Chief-Justice Marshall in 5 Wheaton, and followed by this court with but slight if any modifications, except in name, such as must be "*fairly*," instead of "*strictly*" construed.

The Oregon Criminal Code.

The Oregon code provides, as follows, as to what should be contained in the indictment:

"Section 1268. The indictment must contain:

"First. The title of the action. * * *

"Second. A statement of the acts constituting the offense, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended."

1 Hill's Annotated Laws of Oregon, vol. 1, p. 768.

"Sec. 1271. The indictment must be *direct* and *certain* as it regards—

"First. The party charged;

"Second. The crime charged; and—

"Third. The particular circumstances of the crime charged when they are necessary to constitute a complete crime."

Hill's Oregon Code, pp. 770, 771;
People *v.* Sowers, 14 Cal., 29;
People *v.* Sween, 49 *id.*, 388;
People *v.* Jefferson, 52 *id.*, 452.

"Section 1279. The indictment is sufficient if it can be understood therefrom:

"First. * * *

"Second. * * *

"Sixth. That the act or omission charged as the crime is *clearly* and *distinctly* set forth, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

"Seventh. That the act or omission charged as the crime is stated with such a degree of *certainty* as to enable the court to pronounce judgment, upon conviction, according to the right of the case."

Hill's Annotated Laws of Oregon, p. 774.

"SEC. 1278. Words used in a statute to define a crime need not be strictly pursued in the indictment, but other words, *conveying the same meaning*, may be used."

Hill's Annotated Laws of Oregon, p. 774;
Yan Yan, 10 Oregon, p. 365.

"While it may not be necessary to follow in an indictment the strict language of the statute, by which the offense is defined, it is absolutely necessary to employ words conveying the *same* meaning."

This was held under the liberal criminal code of California, similar to the Oregon code, in People *v.* Potter, 35 Cal., 110.

"SEC. 2050 (787). The rule of the common law that penal statutes are to be construed strictly has no application to this code, but all its provisions are to be construed according to the fair import of their terms, with a view to affect its objects and to promote justice."

Hill's Oregon Code, vol 1, p. 1000.

"An indictment must be direct and certain as to the party charged, the *offense charged*, and the particular circumstances of the offense charged when they are necessary to a complete offense."

People *v.* Sayers, 14 Cal., 31.

"An indictment must be so drawn as to exclude any assumption that the indictment may be proven and the defendant still be innocent. (State *v.* Melville, 11 R. I., 418.")

State *v.* Smith, 11 Oreg., 207.

The Supreme Court of Oregon, in the case of State *v.* Smith, 11 Oregon, *supra*, said:

"To constitute the precise offense charged, the court deem the rule to be deduced from the authority to be that the prisoner must have known Collins to be an officer of the penitentiary. (2 Bishop Criminal Law, sec. 51; Bishop Statutory Crimes, sec. 64; Commonwealth *v.* Kirby, 2 Cush., 581; Horn *v.* State, 7 Tex., 183; State *v.* Downer, 8 Vt., 424.)"

State *v.* Smith, 11 Oreg., 207.

In the case of State *v.* Dougherty, 4 Oregon, 202, the Supreme Court of Oregon, in referring to these provisions of the Criminal Code of Oregon, said:

"While it clearly appears to have been the purpose of our legislature to simplify the old common-law system of criminal jurisprudence, by divesting it of many of its technical requirements, such as do not appear to affect the substantial rights of the accused, yet we do not think that it was ever intended to abolish or dispense with any of the essential requirements of an in-

dictment as sanctioned by the wisdom and experience of the past, and as adjudged and determined by the well-established rules of good reason."

"Penal statutes can not be extended beyond the grammatical and natural meaning of their terms on any plea of failure of justice."

Remington *v.* State, 1 Oreg., 281.

"Force and meaning should be given to every clause and word, and courts will not, except in cases where the language is so vague and indefinite as to be wholly destitude of meaning or construction, reject any portion of them."

Souter *v.* Seawich, 1 Cal., 164;
Smith *v.* Randall, *id.*, 47;
Cheaver *v.* Hayes, 3 Cal., 473;
Seabury *v.* Arthur, 28 Cal., 150;
People *v.* Natten, 31 Cal., 415.

The above cases are cited by Annotator Hill in the Oregon code.

Section 1900, Hill's Oregon Code, vol. 1, p. 960, is as follows:

"Sec. 1900. If any person imprisoned in the penitentiary shall, with a deadly weapon, strike, wound, stab, cut, shoot, or shoot at, any superintendent, keeper, or assistant keeper of the penitentiary, or other officer or person having charge or custody of such person so imprisoned, or if any person sentenced to the penitentiary shall, with a deadly weapon, strike, wound, stab, cut, shoot, or shoot at, any sheriff, deputy sheriff, or his assistants having charge or custody of the person so sentenced, such person, upon conviction thereof, shall be punished with death.

"An indictment for assaulting and wounding an officer of the penitentiary with a deadly weapon, under this section, 1900, Oregon Code, must state that the accused *knew* that the party assaulted was such officer."

So held by the Supreme Court of Oregon in the case of State *v.* Smith, 11 Oreg., 205; State *v.* Packard, 4 Oreg., 157; Hill's Oregon Code, vol. 1, pp. 770 and 960.

"It is a general rule that there should be such certainty of description as will identify the offense, so that the party may not be indicted for one thing, and tried for another; certainty is also required to the end that the defendant may know what crime he is called upon to answer, that the jury may be able to deliver an intelligible verdict, and the court to render the proper judgment; and, finally, that the defendant may be able to plead his conviction or acquittal in bar of another prosecution for the same offense."

People *v.* Taylor, 3 Denio, 91;
State of Oregon *v.* Dougherty, 4 Oreg., 202.

I am aware some authorities have held that penal statutes which form a part of the revenue system of the Government must be construed more liberally than other penal statutes, but the authorities on this subject are not uniform, and it is quite difficult to understand, in view of the VII. amendment to the Constitution, why there should be any difference in determining as to the sufficiency of an indictment. But under even the most liberal rule of construction known to courts, the indictments in this case, it is submitted, are insufficient, not merely in form, but in substance and effect, affecting the substantial, including the constitutional, rights of the accused.

To hold, therefore, that the omission in the indictment of an essential portion of the descriptive words defining the article taxed, such as "*containing less than nine per centum of morphia*," or the words "*opium prepared for smoking*," instead of the words "*prepared opium*," or that the accused had *knowledge* that the duty had not been paid, would be to ignore and set aside, not only the Constitutional provision, and that old, well-

recognized rule of construction applicable to criminal statutes, which Chief-Justice Marshall, in United States *v.* Wilterberger (5 Wheat., 95), declared to be "not much less old than construction itself," but also the more modern rule in many of the States where, under statutory enactments, criminal statutes are, as the term goes, "*fairly*," instead of "*strictly*," construed. Although, in fact, the construction placed by courts on penal statutes these later years is but very slightly, if any, different, nor should it be, from that good old rule so clearly and so well stated by Chief-Justice Marshall. And the doctrine enunciated by him and followed, as it was, by Chief-Justice Taney in United States *v.* Morris, 14 Peters, 46, approved by Story and other great jurists, may be properly invoked here.

Assignment II.

Exception VI.

Assignment II is as follows :

"That the matters testimony tending to prove which was given upon the trial in the above-entitled matter as to the said ninth count of said indictment under section 3082, do not constitute a crime by the common law or under any statute of the United States." (Record, 23.)

This count is considered in connection with Exception No. VI (Record, 45–46), being the only testimony relating to count nine which it is claimed tends to corroborate Blum.

Point III.

The ninth count in indictment number 3580 under section 3082, Rev. Stat. (Record, 11–12), is the only count charging defendant with unlawfully facilitating the transportation of "prepared opium" upon which a conviction was had. This count, of course, like all

others, is fatally insufficient and defective in not averring that the opium alleged to have been smuggled, and the transportation of which it is alleged the defendant wrongfully facilitated, was "opium *prepared for smoking*." There, however, is in this count, unlike the other counts, an averment that the defendant well knew that no duty had been paid or accounted for on this opium. The only point, therefore, here urged to the sufficiency of this count is the failure to aver that the alleged contraband was "opium *prepared for smoking*." It is claimed, however, by this assignment of error, that the record in this case, taken as a whole, shows the only testimony offered by the Government, outside of Blum, the acknowledged accomplice, to sustain the material averments of the *ninth count* of this indictment, was that of Sigmund Baer (Exception VI, Record, 45), and this, conceding for the present its competency—and this is controverted later on in this brief—does not in any respect corroborate Blum's testimony as to the defendant's guilt as charged in this count, and does not tend even to prove *any offense whatever*.

This testimony—conceding its competency, relevancy, and materiality, all of which are emphatically denied, and conceding also its truth—all that it even tends to prove is that the witness, Baer, at the instance of Blum, the self-convicted accomplice and criminal, received in San Francisco the proceeds of the sale of certain opium. What opium? Whether contraband or otherwise, whether liquid or otherwise, whether "prepared opium" or "prepared '*opium for smoking*,'" does not appear; whether Dunbar, the defendant, ever saw or heard of it, or ever had anything to do with its transportation, is not hinted at; whether it was the same opium referred to in the testimony of Blum (Exceptions III, IV, Record, 41–44) is not suggested; or whether it was opium that had ever been imported into this country

without payment of duty, is a matter on which the testimony is silent as the grave; and at Blum's instance, applied a portion of such proceeds in cancellation of a draft drawn on Blum by defendant, Dunbar, and deposited the balance to Dunbar's credit in the Anglo-California Bank in San Francisco. This testimony, therefore, does not tend even to *corroborate* Blum; nor does it tend to prove the material averments in the ninth count.

But this phase of this case will be more fully considered, later on, in connection with other exceptions relating to the competency of the testimony of Sigmund Baer and the charge of the court to the jury thereon. (Exceptions VI and XI, Record, 45 and 50–51.)

Assignments III, IV and X.

Assignment III (Record, 23, 24), will be considered in connection with what has just been said, and with the several exceptions relating to the admission and rejection of testimony, as stated in the bill of exceptions I–VIII, inclusive (Record, 39–47), and assignments IV and X (Record 24 and 30), will be considered together in the light of exception I in bill of exceptions (Record, 39–40), and exception V (Record, 45).

Assignment III is as follows:

That the district court of the United States for the said district of Oregon erred in not instructing the jury upon the trial of this cause to return a verdict of not guilty upon all of the counts of each indictment upon the ground of an insufficiency of the evidence to justify a verdict of guilty; and as to the five counts of indictment under section 2865, Revised Statutes, and as to the first five counts of indictment under section 3082, Revised Statutes, upon the ground that there is no allegation of a scienter upon the part of the defendant. (Record, 23, 24.)

The questions raised by this assignment have been considered in connection with the consideration of assignments I and II.

Assignment IV is as follows:

That the said district court erred in its ruling in admitting testimony as to the contents of a letter written by the witness Nathan Blum to the defendant from Vancouver, British Columbia, on Major Wilson's letter-head, as evidenced in the said testimony as follows: While the said witness, Nathan Blum, was on the witness stand the following testimony was elicited:

Q. What Vancouver was this; British Columbia?

A. Yes, sir; Mr. Jackling was there with me and we put it aboard the steamer. I wrote to Mr. Dunbar from there on Major Wilson's letter-heads, telling him how much opium was bought and how it was packed.

Counsel for defendant thereupon objected to the latter part of the answer, giving the contents of the letter, claiming that the letter was the best evidence.

Mr. GEARIN: Dunbar has got the letter. He can produce it.

Mr. MCGINN: He ought to have been served with notice to produce it.

COURT: You can ask the witness if he has the letter. There is no presumption, however, that he has. (To the witness:) You may state what you wrote to Dunbar.

Defendant excepts to the ruling.

A. I wrote to Dunbar that I had purchased 450 pounds of opium; that it was shipped in so many cases; I am pretty certain it was four cases; two cases were marked one way and two cases another way—that is, different marks.

(Record, 24; See Bill of Exceptions No. 1, Record, 39, 40.)

While assignment X reads as follows:

That the court erred in admitting testimony of the witness Blum as to the contents of a letter written by him to the defendant, telling him how much opium he had bought in Vancouver, how it was packed, and how

many packages, etc., as disclosed in the following testimony, to wit:

"While I was in Vancouver, after purchasing this opium, I wrote a letter to Mr. Dunbar, which I think I showed to Jackling, telling Dunbar how much opium I had bought, how it was packed, and how many packages. I also told him to have Garthorne and Berg at a point in the Columbia river which was just a few miles below the mouth, telling him I would telegraph from Astoria when we arrived; that they should stop at this point and when the ship came in sight to swing their lantern two or three times and when we got abreast of them we would have the pilot give one short whistle; that was a signal that the opium was thrown overboard. We started up the river about seven o'clock and about half-past two or three o'clock we passed this point. I was on the bridge with Captain Moody and we saw their light—

Mr. SEARS: I suggest to your honor the ruling of yesterday as to the admission of the contents of these letters and as to the circumstances of this transaction.

COURT: You asked for these letters.

Mr. SEARS: I think this comes within the ruling of yesterday. The court will allow us an exception to the contents of the letter.

COURT: Yes, sir.

(Record, 30; see Bill of Exceptions V, Record 15.)

Point IV.

These assignments IV and X present the simple question as to whether it was competent to permit the witness, Blum, the self-confessed conspirator and accomplice, to testify *orally* as to the *contents* of certain letters alleged to have been written by him in Vancouver, British Columbia, to the defendant, Dunbar, in Oregon, telling him how much opium he, Blum, had bought, and how it was packed, in the absence of the alleged letters, and in the absence of any attempt upon

the part of the Government to account for them, no notice to produce any such letters having been served on the defendant.

It is respectfully submitted this testimony was not competent. It is conceded the general rule is that where a writing is shown to be in the hands of the opposite party, and *reasonable* notice has been given to produce it, and it is not produced, either a copy or oral testimony is then admissible as to its contents. The Government, however, did not bring itself within this rule in the present case. There was no attempt even upon the part of counsel representing the Government to come within the rule, or to lay the proper foundation for the admission of oral evidence (Exception I, Record, 40). The witness, Blum, after testifying that he—Blum—and a confederate named Jackling were in Vancouver, in British Columbia, and that they had placed aboard a steamer presumably certain contraband opium, says: "I wrote to Mr. Dunbar from there on Major Wilson's letter-heads," and then before counsel for the defendant had time to interpose an objection, the witness, with impetuous haste, and overflowing with virtuous indignation at the thought of Dunbar's rascality, proceeded to give the contents of the alleged letter, by saying—"telling him how much opium was bought, and how it was packed."

Counsel for defendant thereupon objected to the latter part of the answer, giving the *contents* of the letter, claiming that the letter was the best evidence. (Record, 40.)

Mr. Gearin, counsel for the Government, responded to this objection, as follows:

"Mr. GEARIN. Dunbar has got the letter. He can produce it."

Mr. McGinn, counsel for defendant, replied to this with the following very pertinent remark:

"Mr. McGINN. He ought to have been served with notice to produce it." (Record, 40.)

Then the court interposed, as follows:

"COURT. You can ask the witness if he has the letter. There is no presumption, however, that he has. (To the witness): You may state what you wrote to Dunbar." (Record, 40.)

"Whereupon the said defendant, by his counsel, duly excepted to the ruling of the court, and his exception was by the court allowed. Whereupon the said defendant answered as follows:

"Answer. I wrote to Dunbar that I had purchased 450 pounds of opium; that it was shipped in so many cases; I am pretty certain it was four cases; two cases were marked one way and two cases another way—that is, different marks." (Record, 40.)

This ruling of the court below, it is respectfully submitted, was gross—inexcusable error. It was a plain violation of one of the oldest and best understood rules of evidence, which should not be regarded as but reversible error in a civil proceeding, and *a fortiori* should it be so regarded in a criminal case.

This alleged letter, alleged to have been written by a self-confessed criminal, was never shown to have been mailed or otherwise sent to Dunbar—much less was any attempt made on the part of the Government to show Dunbar had ever received it. "I wrote to Mr. Dunbar from there," says the witness (Record, 40). He does not say he ever mailed the letter, or sent it to him in any way whatever. And, assuming he did mail it, however, and that in such case that it is presumed Dunbar received it, there is no pretense that any notice, written or verbal, had ever been given to produce it, not even on the trial—none whatever.

The first indictment in this case was returned to the court July 14, 1893. The trial did not commence until

November 28, 1893, four and one-half months subsequently. Yet in all this time no intimation is given to defendant that it is the intention of the Government to offer parol or any evidence of the *contents* of this alleged letter; and yet the court permits this accomplice, this self-convicted criminal, to testify to the alleged contents—of this alleged error—for the purpose of fastening guilt upon the defendant.

It was a great oversight, a grave judicial error, as it seems to me, on the part of this generally careful and accurate judge, committed inadvertently in the rush of a trial, and one which could not but most seriously tend to the prejudice of the defendant's rights before the jury. And for this reason alone this case should be reversed, and a new trial ordered.

Moreover, this evidence was incompetent, unless it had been shown either that Dunbar had received this letter, accepted it, and acted on it, or that a conspiracy was alleged and proven; the former is not claimed, and no conspiracy is alleged in either of the indictments, or proven by the testimony.'

Point V.

What has just been said is also applicable to assignment X (Record, 307), Exception V (Record, 157).

Assignment V, Exception II.

This assignment and exception are as follows:

That the said district court erred in permitting the said witness, Blum, to give further testimony as to the contents of letters as follows: When the said witness, Blum, was on the stand the following testimony was admitted against the objection of defendant's counsel, to wit:

Q. They got all the opium?

A. Yes; they got all the opium, and after the thing was over Mr. Kelly, Mr. Garthorne, and Mr. Berg recited the circumstances of going down there, and Mr. Dunbar and I wrote several letters of inquiry over to Vancouver—I think I wrote most of them—to find out who this man was. We finally ascertained that it was a man employed by the Canadian Pacific railroad at Vancouver, but who had made it his interest to protect the interest of the American Government, and finally ascertained his name, and Mr. Dunbar wrote repeated letters to Mr. Brown, superintendent of the Canadian Pacific, urging this man's discharge and showing the fact that he had interfered with our business.

Counsel for the defendant makes the same objection to this testimony as heretofore made and asks an exception to its admission.

WITNESS: I can produce the letters if the books were here, but Mr. Dunbar has those.

(COURT:)

Q. Has he those letters?

A. Yes, sir; they were all copied in our letter books belonging to the Merchant Steamship Company; they are all in the possession of Mr. Dunbar.

Mr. GEARIN: Counsel says they have not had any notice. We now give counsel and the defendant notice to produce these letters and the copies they have—the letters written to Dunbar and letter-press copies of letters written by him.

Mr. MCGINN: There are no such letters in existence. We have not got any such letters.

COURT: If you have the letter books of the company you can produce them.

Mr. MCGINN: Does your honor make a ruling on the request of counsel?

COURT: You have objected to this evidence on the ground that he has not produced these letters. The witness says they are in the letter book itself of Dunbar & Company.

WITNESS: Yes, sir.

COURT: Counsel has notified you that you may produce these letter books.

Mr. McGINN: We have no such letters, and never have had.

COURT: You may produce the letter books if you want to.

(Record, 24, 25; see Bill of Exceptions No. II, Record, 40, 41.)

Point VI.

This testimony, as described in the bill of exceptions, was intended to show the jury that some person employed by the Canadian Pacific Railroad at Vancouver, British Columbia, was interfering with the smuggling business of the witness, Blum; and for the purpose of convincing the jury that the defendant, Dunbar, was associated with the witness, Blum, as his accomplice in the smuggling business, the witness, Blum, was permitted to testify both as to the sending and contents of certain letters; and the alleged fact that not only the witness, but the defendant, Dunbar, had written "several letters of inquiry over to Vancouver" (Record, 40), and that the defendant, "Dunbar, wrote repeated letters to Mr. Brown, superintendent of the Canadian Pacific Railroad, urging this man's discharge, and showing the fact that he had interfered with our (their) business." (Record, 40.)

What has already been said in reference to the error in permitting Blum to testify to the contents of the letter alleged to have been written by him to Dunbar is applicable here.

Assignment VI.

Assignment VI (Record, 25–26) does not seem to have been included in the bill of exceptions, and as it relates to testimony can not be considered, and is therefore now waived.

Assignments VII and VIII, Exceptions III and IV.

Assignments VII and VIII (Record, 26–29), supported by exceptions III and IV (Record, 41–44), will be considered together. They each relate to the competency of certain testimony as to the contents of certain telegrams alleged to have passed between the witness, Blum, and the defendant, Dunbar.

Point VII.

In assignment VII, exception III (Record, 26, and 41–42), the precise question presented is:

1st. Whether the original writing of a telegram left by the sender at the receiving office, or the telegram as delivered to the person to whom it is sent at the end of the route by the delivering office is in law the original, within the meaning of the statute on the subject of documentary evidence, or is the latter competent evidence, no evidence having been submitted tending to show that the original writing could not be produced.

In Smith *v.* Easton (54 Md., 138) it is held that a telegraphic dispatch is not admissible in evidence without proof of the handwriting of the original, and of its delivery for transmission. This was an action to enjoin an agreement by telegraph to endorse. The court said:

"The message, if any, sent by James T. Easton to that office, to be transmitted to Chesapeake City, was the original (Scott & Jarmagin, Law of Tel., sec. 357, and authorities there cited), and not the message which was received over the wires at Chesapeake City. The latter must be considered as a copy (*Id.*, sec. 361), and carries with it none of the qualities of primary evidence.

Ordinarily the usual course is to show the delivery of the original message of the party sought to be charged, at the office, from which it is to be telegraphed, and then show that it was transmitted and delivered at the place of destination. But even where the original is produced its authenticity must be established, and this either by proof of the handwriting, or by other proofs establishing its genuineness. The destination of all the messages sent from the office, on the day named, is sufficient foundation for the admissibility of secondary evidence. But this secondary evidence can only be admitted upon proof that the copy offered is a correct transcript of a message actually authorized by the party sought to be affected by its contents."

This is sustained by Howley *v.* Whipple, 48 N. H., 487; U. S. *v.* Babcock, 3 Dill., 576.

Mr. Abbott (Trial Ev., 290) assents to this when the object is to prove assent or admission, but says the copy delivered is the primary evidence to prove notice to the receiver.

Wheat *v.* Cross, 31 Md., 99;
1 Am. Rep., 28.

In Barnes *v.* Brown (25 Kans., 410), it is held that where the controversy is not between the sender and the person to whom a telegram is addressed, the original message, if not lost or destroyed, must be produced.

Note 38, Amer. Rep., 5-6;
Whilden *v.* Merchants' and Planters' National Bank, 38 Amer. Rep., 5-6.

The paper claimed to be a telegram from Dunbar to Blum, and read in testimony against the objection of defendant, did not purport to be the original telegram, nor was there any attempt made to prove that Dunbar had ever left such a telegram at the receiving office in San Francisco. It is claimed, however, that Dunbar

subsequently *confessed* or *admitted* he had sent such a telegram, but evidence as to this confession or admission was equally incompetent.

"The admissions of a party are competent evidence only where parol evidence of the fact sought to be shown by such admissions would be competent."

The Welland Canal Co. *v.* Hathaway, 11 N. Y. Common Law., 480.

The court, Nelson, J., in the case of the Welland Canal Co. *v.* Hathaway (11 N. Y. C. L. Rep., 480), said:

"I am not aware of any principle in the law of evidence which will authorize us to substitute the declarations of a party, even as against himself, for record or written evidence, and thereby dispense with its production. Such admissions rank only with oral testimony, and are entitled to no higher consideration in deciding upon the competency of evidence.

"It may be laid down, I think, as an undeniable proposition that the admissions of a party are competent evidence against himself *only* in cases where parol evidence would be admissible to establish the same facts, or, in other words, where there is not in the judgment of the law, higher and better evidence in existence to be produced. It would be a dangerous innovation upon the rules of evidence to give any greater effect to confessions or admissions of a party, unless in open court, and the tendency would be to dispense with the production of the most solemn documentary testimony."

Moreover, this testimony of Blum as to this alleged facilitating transportation of opium on the part of defendant, as alleged in count nine of the indictment, is not corroborated by the testimony of any one.

Point VIII.

The VIII. assignment (Record, 28–29), supported by exception IV (Record, 43–44), presents the question as

to whether it was competent for the witness, Blum, to testify orally, not only to the fact that he sent certain telegrams to the defendant, Dunbar, but also to their alleged contents, no evidence having been offered to explain the absence of such telegrams, either as left at the receiving office, or as received at the office of delivery.

The admission of oral testimony, it is confidently submitted, was manifest error. Conceding, for the present, that it was competent for the Government to show by competent evidence—and of this there may be grave doubt—that the witness had sent the defendant, Dunbar, a telegram or telegrams, it is respectfully submitted it was not competent to show such fact, much less to show the alleged contents of the same by oral testimony, no evidence having been vouchsafed tending to show why such telegram, either in the form left at the receiving office, or in the form delivered at the end of the route, was not produced. This, it is submitted, was a gross error, gravely violative of the well-settled rule of evidence upon this question and of the rights of the accused.

Assignment IX (Record, 29–30) is waived, as there is nothing in the bill of exceptions to sustain it.

Assignment XI, Exception VI, and Assignment XX, Exception XI.

These assignments XI and XX (Record, 30 and 36), and exceptions VI and XI (Record, 45 and 50), will be considered together.

Assignment XI (Record, 30), exception VI (Record, 45), is as follows:

The court erred in admitting testimony of the witness, Sigmund Baer, to the following effect, to wit:

Question. Did you ever turn over any proceeds of the sale of opium to Mr. Dunbar?

Answer. Yes, sir.

Question. How did you come to do that?

Answer. The proceeds of the opium were left for collection in San Francisco. I went there and collected them. I went—there was an order—there was a paper in the Pacific Bank. If you will allow me I will refer to a memorandum I have.

Question. Explain it or any memorandum you have to refresh your memory or refer to it.

Answer. After the sale of the opium had been made there was $1,295 left for collection. I collected that amount, $1,295, and paid $1,077.35 to the Pacific Bank and took up the note drawn by Mr. Dunbar.

Whereupon the defendant, by his counsel, objected to the introduction of any testimony as to the contents of the note or reference thereto upon the ground that the note would be the best evidence, but the said objection was by the court overruled; to which ruling of the court defendant excepted, and his exception was allowed; thereupon the witness answered and gave testimony as follows:

Answer. I paid the Pacific Bank $1,077.35.

Question. How much did you say?

Answer. $1,077.35. There had been a payment already on it; that was the balance due on the note.

Question. Whose note was it?

Answer. A note drawn or draft——

(COURT:)

Question. What was this note?

Answer (cont'd). Drawn by Mr. Dunbar on Mr. Blum, held for collection by the Pacific Bank.

Question. Which was it, a note or a draft?

Answer. A draft.

Answer. I then sent this draft cancelled to Mr. Blum.

Question. Where?

Answer. To Portland. I also was ordered to keep the money—the balance—until I was advised what to do with it.

Question. Did you ever receive any advices from Mr. Blum what to do with the balance of it?

Answer. I did.

Question. What did you do with it?

Answer. I deposited $217.65, the balance left in my hands, to the credit of William Dunbar, in the Anglo-California Bank.

Point IX.

The first question presented by this exception is as to the competency of the testimony of the witness, Sigmund Baer, as to the existence and contents of a certain paper, called by the witness by different designations as "an *order*," "a *paper* in the Pacific Bank;" a *note*, as, referring to the same document, he says, "I took up the *note*;" and again, a "*draft*," as he says, "a *note* drawn *or draft*;" and again, in answer to a question by the court as to which it was, a note or draft, he answers "*a draft* drawn by Mr. Dunbar *on Mr. Blum*, held for collection by the Pacific Bank." (Record, 45-46.)

Now, the purpose and effect of this testimony were to tend to show that the defendant, Dunbar, was interested in this contraband opium, alleged to have been sold in San Francisco, and in the proceeds of the sale, because, forsooth, a certain alleged *obligation*, *order*, or *draft*, held by him against or drawn by him on the witness, Blum, had been cancelled with a portion of the proceeds. This alleged obligation—this paper, order, note, draft, whatever it was, and the witness calls it by all four of these designations—is, according to the testimony of the Government's witness, Baer, traced into the hands of Blum, the payee, on whom it was drawn, and the principal prosecuting witness, and yet the paper, note, draft, order, or whatever it was, is not forthcoming, nor is the slightest attempt made to explain its absence; and yet the witness, Baer, is permitted, over the objection of defendant's counsel, to give his *oral* testi-

mony, not only as to the existence of the alleged paper, but also as to its *contents*.

The witness, Baer, then says :

"I then sent this draft, cancelled, to Mr. Blum.
"Ques. Where?
"A To Portland." (Record, 46.)

But still further is the Government permitted by incompetent testimony to implicate the defendant in connection with this alleged sale of opium. This witness testifies in substance and effect that he was *ordered*, not by Dunbar, the defendant, but by Blum, the prosecuting witness, to retain the balance of the money, the proceeds of the alleged sale, until the witness was advised what to do with it, and subsequently the witness was advised, so he states, not by Dunbar, but by Blum, to deposit it—$217.65—to the credit of William Dunbar in the Anglo-California Bank. (Record, 46.)

All this might have occurred precisely as stated by the witness and yet the defendant be as innocent as the unborn babe of the whole transaction, or of any connection whatever, so far as this testimony is concerned, of having in any manner facilitated the transportation of the opium referred to. It is not contended that there is a particle of evidence tending to show that the defendant, Dunbar, ever authorized either Sigmund Baer or Blum to pay to or deposit a dollar or any other sum on his account, or for his benefit, in the Anglo-California Bank, while Dunbar, in his evidence, denies any knowledge of any such transaction. (See charge of court, Record, 56.)

Yet, notwithstanding the incompetent character of this testimony, its secondary nature, the failure on the part of the Government either to produce the alleged

obligation, note, order, draft, or whatever it was, or to make the slightest effort by evidence to trace it into the hands of the defendent or account for its destruction, loss, or absence, the court, in his charge to the jury, attracted especial attention to this testimony, and, unfortunately, misquoted and misinterpreted it, evidently inadvertently, to the jury, and placed unusual emphasis upon it, going even to the unwarrantable extent of declaring to the jury that if what the witness said, as interpreted by the court, was true "the circumstances would be inconsistent with innocence on the part of Dunbar." (Charge of the court, Record, 56.) This charge will be considered under Assignment XX, Exception XI.

Assignment XX, Exception XI.

Point X.

This assignment, XX (Record, 36, 37), supported by exception XI, bill of exceptions (Record, 50, 51), challenges the correctness of this charge of the court to the jury, both as to the accuracy of the recital to the jury and as to the effect of the testimony of Sigmund Baer, already referred to, in connection with the ninth count of indictment No. 3580 (Record, 11), which charges the defendant with having facilitated the transportation of certain prepared opium, the same having been, as averred, smuggled into this country.

As has been already stated in other portions of this brief, in treating of the testimony of Sigmund Baer, the court, in his charge to the jury, after reciting the court's interpretation of the testimony of Baer, as to the alleged payment of Dunbar's drafts from proceeds of the sale of the opium, and as to depositing the balance of the money after the payment of the draft to Dunbar's credit, said to the jury:

"If that is so, the circumstances would be inconsistent with innocence on the part of Dunbar of this transportation, and the tendency would be to connect Dunbar with it, because ordinarily men do not deposit money to pay the debts of other people, or deposit to the credit of other people, unless that money belongs to those people and there is some understanding that it is to be done. Dunbar has denied that he has any knowledge of any transaction of this character. Whether this denial is overcome by the testimony on the part of the Government is left to your judgment." (Record, 51.)

The vice, if the court please, in this portion of the charge of the court below, consists in a positive statement to the jury that if the statement made by Sigmund Baer were true, that then the circumstances stated by him would be inconsistent with innocence on the part of Dunbar. The court, it is respectfully submitted, in this statement assumed the province of the jury. Whether the existence of the facts stated by the witness, Baer, was consistent or inconsistent with innocence on the part of Dunbar, was a question peculiarly and properly within the province of the jury to decide. Moreover, it is respectfully submitted, if it were a matter to be determined by the court, or if it were proper that the court should state to the jury its judgment as to the conclusive effect of the testimony, then it is respectfully submitted the court was absolutely wrong in the statement that the existence of the circumstances detailed by Baer were inconsistent with innocence on the part of Dunbar. True, it may be the circumstances detailed by the witness, Baer, if true, might, in connection with other testimony in the case, be deemed inconsistent with innocence on the part of the defendant, but standing alone, in and of itself, no such effect can properly or should have been assigned to it.

It will be borne in mind in considering this question—

First. That the witness, Baer, does not in his testimony pretend to say, either directly or indirectly or inferentially, that the defendant, Dunbar, had any knowledge whatever of the circumstances stated by him, much less that he had given any directions, directly or indirectly, in relation thereto. (Exception V, bill of exceptions, Record, 45–46.) And—

Secondly. That the court charged the jury directly, and without any qualification whatever, that if what Baer testified to were true, then the circumstances stated by him were "inconsistent with innocence on the part of Dunbar." (Record, 50–51, Exception XI.)

The court, after reciting to the jury, incorrectly, as will be shown hereafter, the testimony of Baer, said to the jury:

"If that is so, the circumstances would be inconsistent with innocence on the part of Dunbar of this transportation."

It is true the court added:

"And the tendency would be to connect Dunbar with it, because ordinarily men do not deposit money to pay the debts of other people, or deposit it to the credit of other people, unless that money belongs to those people and there is some understanding that it is to be done. Dunbar has denied that he has any knowledge of any transaction of this character. Whether this denial is overcome by the testimony on the part of the Government is left to your judgment."

This, taken as a whole, was simply saying to the jury:

"If you believe that Sigmund Baer testified to the truth, then what he testified to is inconsistent with innocence on the part of the defendant, Dunbar. In other words, if you believe Baer's testimony to be true, then

Dunbar is guilty, irrespective of any and all other evidence in the case, because he cannot be innocent if such testimony is true, for the reason" as stated by the court, without any qualification whatever, "that the circumstances testified to by Baer are inconsistent with his innocence."

If the court had omitted to declare to the jury that the circumstances testified to by Baer would, if true, be inconsistent with Dunbar's innocence, and in lieu had stated that such circumstances, if true, *tended* to inculpate the defendant, and that it was for the jury to determine whether these circumstances, taken alone or in connection with all the other evidence in the case, were sufficient to satisfy the jury beyond a reasonable doubt of the guilt of the defendant, it might not have been open to so much criticism.

But even such a charge, it is submitted, would under the circumstances not have been entirely free from grave criticism, and for this reason: It is clear that it is quite possible that all that Baer testified to may be true beyond a doubt, and still the defendant may have been entirely innocent. It might be true, for instance, that Blum was indebted to Dunbar, payable on Dunbar's draft on him, deposited in and payable at the California Bank, and that Blum honestly owed the money to Dunbar, and that Baer, under Blum's direction, cancelled that obligation for Blum with the proceeds of crime on their, Blum's and Baer's, part—that is to say, by the proceeds of the sale of smuggled opium; and it might further be true that under Blum's direction Baer deposited in the Anglo-California Bank to Dunbar's credit a certain balance of the proceeds of such crime, either in satisfaction of another debt owing by Blum to Dunbar or for any other innocent purpose, and still Dunbar might be as innocent as a saint.

Judge Bellenger, it is submitted, misinterpreted the testimony of Sigmund Baer in his charge to the jury, in this, that he gave the jury to understand that it was a debt of Dunbar—a debt *owing by Dunbar* to Blum—which the draft referred to by Baer as having been paid out of the proceeds of the sale of opium represented.

This was incorrect. This draft, according to Baer's testimony (Record, 46), did not represent a debt owing by Dunbar to Blum, but on the contrary, did represent a debt owing by Blum to Dunbar. Baer testifies it was "a draft drawn by Dunbar on Blum, held for collection by the Pacific Bank;" and further, "I then sent this draft, cancelled, to Mr. Blum. (Record, 46.)

It was, therefore, Blum paying his own debt, and not Dunbar's debt, as stated by the court to the jury. The court gives to the jury as a reason why the circumstances detailed by Baer if true "would be inconsistent with innocence on the part of Dunbar of this transportation" (Record, 56), "because, ordinarily, men do not deposit money to pay the debts of other people * * * unless that money belongs to those people, and there is some understanding that it is to be done." This, it is submitted, was not a correct interpretation of the testimony, and was calculated to mislead and prejudice the jury.

Assignments XII and XIII (Record, 31, 32) are waived, there being nothing in the bill of exceptions to support them.

Assignments XIV and XV, Exceptions VII and VIII.

The assignments XIV and XV (Record, 32, 33) extions VII–VIII, (Record, 46, 47), will be considered together.

Point XI.

These exceptions raise the question as to the competency of certain questions propounded to the witnesses H. Wittenberg and Thos. Coleman by defendant's counsel, and ruled out by the court. These questions related to evidence affecting the character of the witness, Blum, for truth and veracity. (Record, 46–47.)

Assignments XVI and XVII are waived, there being nothing in the bill of exceptions to sustain them. (Record, 33.)

Assignment XVIII, Exception IX.

This assignment is as follows:

After the rendition of testimony said court instructed the jury upon the issues and the law, said instruction on the subject of a reasonable doubt being as follows, to wit:

"As to the matter of reasonable doubt, you must not be misled by what I said as to probability. That is not sufficient. You must not decide upon probabilities, but upon strong probabilities—so strong as to exclude a reasonable doubt. You do not decide questions in criminal cases the same as you do in civil cases, on the preponderance of the evidence, but there must be such a preponderance as to exclude reasonable doubt as to the guilt of the defendant;" and also, "I will not undertake to define a reasonable doubt further than to say that a reasonable doubt is not an unreasonable doubt—that is to say, by a reasonable doubt you are not to understand that all doubt is to be excluded; it is impossible in the determination of these questions to be absolutely certain. You are required to decide the question submitted to you upon the strong probabilities of the case, and the probabilities must be so strong as not to exclude all doubt or possibility of error, but as to exclude reasonable doubt."

To which instruction of the court the defendant, by his said counsel, excepted upon the ground that it had

failed to instruct the jury as to what constituted a reasonable doubt, and in not defining such reasonable doubt and in charging that the jury were to decide upon the strong probabilities of the case ; which exception was by the court duly allowed. (Record, 47.)

Reasonable Doubt.

Point XII.

The foregoing is the charge upon the subject of reasonable doubt, as stated in the exception just quoted. It will be observed, however, that in the entire charge of the court as given (Record, 52–57), the last eleven lines in the above exception were given to the jury early in the charge (Record, 53), while the first nine lines, as set out in the above Exception IX (Record, 47) were given near the close of the charge (Record, 57) ; the two portions of the charge on the subject of reasonable doubt being separated by four pages, while the latter portion of the charge on this subject is placed first in the exception. This may not be material, except that it would seem to indicate that the court, after having given his definition of a reasonable doubt, and having passed to and discussed other questions in the case at length, seemed to be himself in doubt as to the correctness of that definition, and again undertook to define it with, as would seem, no better success than in the first instance, as the two definitions are substantially the same, and it is respectfully submitted neither is right, and both are confusing, and well calculated to mislead the jury.

In construing this exception, therefore (Record, 47), the last eleven lines of the charge should be regarded as having been given to the jury first (Record, 47 and 53), and which was when given evidently intended to be all

the court intended to say on the subject of reasonable doubt; while the first nine lines (Exception IX, Record, 47 and 57) must be regarded as in the nature of a supplement to the former, the two being separated by the bulk of the court's charge on the many other questions involved in the case. And it is respectfully submitted that, although the court in this supplemental charge, admonished the jury that they "must not be misled" by what the court had said in his first charge "*as to probability*," that yet this very circumstance in and of itself was well calculated to confuse and mislead the jury. But not only so, when the court remarked, "you must not decide upon *probabilities*, but upon *strong* probabilities, even though the statement was accompanied with the qualification "*so* strong," that is, the "*probabilities*" must be "*so* strong," as to exclude a reasonable doubt, he did not correctly interpret the law on this subject. When the law says—as it does say—that in a criminal case the jury, in order to convict, must be satisfied from the evidence in the case, beyond a reasonable doubt, of the guilt of the accused, it does not mean that they are to convict either on probabilities, or on strong probabilities, or on any character of probability. The question of *probability* has nothing whatever to do with it. A juror may believe a man *probably* guilty. He may believe that the probabilities are *very strong* that he is guilty, and yet he may be far from convinced, beyond a reasonable doubt, *from the evidence in the case*, that he is guilty as charged. In other words, while a juror may have a thorough belief that the accused is in *all probability* guilty, even so strong as to exclude a reasonable doubt, may he believe the *probability* is that he is guilty, and yet the "*evidence*" in the case may be such as to fall far short of being, in the language of this court in Miles *v.* United States, 103 U. S., 304, "sufficient to produce a

conviction of guilt to the exclusion of all reasonable doubt."

Miles *v.* United States, 103 U. S., 304.

In Miles *v.* The United States (103 U. S., 304, *supra*), the following charge of the court below was assigned as error:

"The prisoner's guilt must be established beyond reasonable doubt. Proof beyond a reasonable doubt is such as will produce an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist, so that you feel certain that it exists. A balance of proof is not sufficient. A juror in a criminal case ought not to condemn unless he be convinced by the evidence, no matter what the class of the evidence, of the defendant's guilt, that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to his own dearest personal interests."

This court held very properly there was in this charge no substantial error affecting defendant's rights, although criticising and condemning, in a mild way, the attempts of courts to explain the words, "beyond reasonable doubt." This court, opinion by the late Justice Woods, said:

"The charge of the court defining what is meant by the phrase, 'reasonable doubt,' is assigned as ground of error. The evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt to the exclusion of all reasonable doubt. Attempts to explain the term, 'reasonable doubt,' do not usually result in making it any clearer to the minds of the jury. The language used in this case was certainly very favorable to the accused, and is sustained by respectable authority. (Commonwealth *v.* Webster, 5 Cush., 295; Arnold *v.* State, 23 Ind., 170; State *v.* Nash, 7 Iowa, 347; State *v.* Ostrander, 18 Iowa,

435; Donnelly *v.* State, 2 Dutch. (N. J.), 301; Winter *v.* State, 20 Ala., 39; Giles *v.* State, 6 Ga., 276.)

"We think there was no error in the charge of which the plaintiff can justly complain."

Similar suggestions as to the danger in courts attempting to define the term, "reasonable doubt," and of the probability of misleading and confusing the jury, have frequently been made by this and other courts of last resort.

In State *v.* Sauer, 38 Minn., 439, the charge of the court below was as follows:

"This does not mean beyond any doubt, but beyond a doubt *for which you can give a reason.*"

This was assigned for error. The court, Mitchell, J., while reluctantly holding the charge not ground for reversal, said:

"This definition is not without some authority to support it. (See Commonwealth *v.* Harmon, 4 Pa. St. Rep., 269–274.) And we are not prepared to say that it contains any error prejudicial to defendant. * * * The term, 'reasonable doubt,' is almost incapable of any definition which will add much to what the words themselves imply. In fact, it is easier to state what it is not than what it is; and it may be doubted whether any attempt to define it will not be more likely to confuse than to enlighten the jury. A man is the best judge of his own feelings, and he knows for himself whether he doubts better than any one else can tell him. Where an explanation of what is meant by a reasonable doubt is required, it is safer to adopt some definition which has already received the general approval of the authorities, especially those in our own State."

In the State of Oregon *v.* Ching Ling, 16 Oreg., 419, the court, in discussing the question of "a reasonable doubt," said:

"It is not enough to say that the accused is *probably guilty*, but he must be *proved* guilty, not beyond a *possible* doubt, but beyond a *reasonable* doubt."

Again, in case State *v.* Roberts, 15 Oregon, 196, the Supreme Court declared the following to be a correct interpretation of the term, "reasonable doubt:"

"Reasonable doubt is not a mere possible doubt. It is that state of the case which, after an entire comparison and consideration of all the evidence, leaves your minds in such a condition that you can not say you feel an abiding conviction to a moral certainty of the truth of the charge. It is not sufficient to establish a *probability, though a strong one*, arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the *evidence* must establish the truth of the fact *to a moral certainty*."

The above, moreover, is in substance and effect the language of Chief Justice Shaw, in Commonwealth *v.* Webster, 5 Cush., 295, and which has, it is believed, been generally accepted by the profession as a correct interpretation and concise definition of the term, "a reasonable doubt."

It is respectfully submitted the charge of Judge Bellinger does in the case at bar not come within the rule, and was well calculated to mislead and confuse the jury, and is, therefore, reversible error.

Assignment XIX. Exception X.

This assignment of error (XIX) relates to alleged error in the instruction of the court to the jury in stating what amounted to corroborating testimony of the accomplices, and in the failure of the court to charge the jury that the opinion of the court upon that subject was not binding upon the jury, but was for their assist-

ance; and in not submitting to the jury the question as to whether Sigmund Baer and William Caples, witnesses for the Government, were or were not accomplices. The assignment will be found *in extenso*, Record, 33–36, supported by exception No. X, bill of exceptions (Record, 47–50).

Point XIII.

Authorities as to Testimony of an Accomplice.

The general rule of law that to justify a conviction on the evidence of an accomplice, his evidence must be corroborated by other evidence, which in and of itself tends to show, not only that a crime has been committed, but which of itself, and without the aid of the testimony of the accomplice, tends to connect the accused with its commission, is, I believe, not controverted.

The Oregon Criminal Code, section 172, states it thus:

"A conviction can not be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission."

Oregon Code, vol. 1, page 802.

Hill, Annotator of Oregon Code, in notes to the above section (Oregon Code, p. 802, vol. 11), says:

"A defendant can not be convicted of a criminal offense upon the testimony of an accomplice unless there is other evidence, which *of itself* and *without the aid of the testimony of the accomplice*, tends in *some degree* to connect the defendant with the commission of the offense."

And in support of this interpretation cites the following authorities:

State *v.* Odell, 8 Oreg., 30;
People *v.* Garnet, 29 Cal., 622;
People *v.* Ames, 39 Cal., 403;
People *v.* Melvane, *id.*, 614;
People *v.* Warren, 39 *id.*, 661;
People *v.* Cleaveland, 49 *id.*, 577;
People *v.* Curell, 53 *id.*, 604.

Who is an Accomplice?

Point XIV.

Webster defines accomplice to be an associate in crime; a partner or partaker in guilt.

Burrell's Law Dictionary defines the term thus:

"One of several concerned in a felony; an associate in crime; one who co-operates, aids, or assists in committing it."

This term includes all the *particeps criminis*, whether considered in strict legal propriety as principals or accessories.

And Wharton's Criminal Evidence, section 440, says:

"An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender unites in the commission of a crime, and to the like effect is Cross *v.* The People, 47 Ill., 152; Davidson *v.* State, 33 Ala., 350."

In the State of Oregon *v.* Odell, 8 Oreg., 32, the Supreme Court, Boise, Justice, delivering the opinion, said:

"The evidence in this case is set out in the bill of exceptions, and we think it appears from the testimony

of the witness, William George, that he was an accomplice with Moran and Odell in the commission of the alleged crime. He says 'Moran went in and carried out the property named in the indictment, while he, the witness, and defendant, Odell, watched on the outside to see if any one was watching them.' Such a participation in the commission of the crime would make him an accomplice (1 Bouvier Law Dictionary, 52). The term in its fullness includes in its meaning all persons who have been concerned in the commission of a crime, all *particeps criminis*, whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessories before or after the fact. (1st Russell on Crimes; 4 Black. Com., 331; 1 Phillips Evid., 28.) It is sufficient that this should appear from the testimony of the accomplice himself in order to enable the prisoner on trial to make the application of the rule that no conviction can be had on the evidence of an accomplice without corroborating testimony."

State of Oregon *v.* Odell, 8 Oreg., 33.

"Such corroboration as tends to connect the accused with the commission of the crime is required by the statute (p. 362, section 172) to render the testimony of an accomplice sufficient to warrant a conviction."

State *v.* Odell, 8 Oreg., 33.

The California statute on this subject is identical with the Oregon statute. (*Supra.*)

The Supreme Court of California, in construing this statute in People *v.* Ames (39 Cal., 404), said:

"As we construe this provision, the corroborating evidence must of itself, and without the aid of the testimony of the accomplice, tend, in some degree, to connect the defendant with the commission of the offense."

People *v.* Melvane, 39 Cal., 614.

To warrant a conviction on the testimony of an accomplice there must be corroborative evidence tending

to criminate the accused, *aside from and without the aid of the testimony of the accomplice.*

People *v.* Ames, 39 Cal., 403;
People *v.* Eckert, 16 *id.*, 110;
34 English Com. Law Rep., 314–381;
1 Wharton's Am. Crim. Law, secs. 785–789.

If in a case there is *any* evidence tending to show that a witness in the case was an accomplice, then the question as to whether such person was, or was not, an accomplice, is one for the jury and not for the court to determine; and the question should be submitted to the jury.

People *v.* Curlee, 53 Cal., 607.

In the case of People *v.* Curlee, *supra*, the court said:

"We are of the opinion that the testimony, as detailed above, did tend in *some* degree to prove that he was an accomplice and it was for the jury to determine what weight should be given to it. At the trial the court of its own motion charged the jury that 'there is no evidence in this case tending to show that the witness Brown was an accomplice in the commission of the offense with which the defendant is charged.' This took wholly from the jury the question whether or not he was an accomplice, and the instruction was erroneous, if there was *any* evidence, *however slight*, tending to prove his complicity; and, as we have seen, there was evidence tending, to *some* degree, at least, to establish that fact. Under section 1111 of the Penal Code, the defendant could not have been convicted on the testimony of an accomplice unless he was corroborated by other evidence, as therein provided; and the court should have submitted to the jury, under proper instructions, the question whether or not he was an accomplice. It may have been a question of vital consequence to the defendant, and we cannot say that he was not prejudiced by the ruling of the court."

In view of the foregoing authorities, and of the admitted facts [see charge of the court as to the testimony of William Caples, Record, 48–49–50, and of Sigmund Baer, 50–51; also testimony of Sigmund Baer, Record, 45–46], it is clear the court erred in charging the jury, that the testimony of these witnesses tended to corroborate Blum, and to connect Dunbar with the commission of the offense, without, at the same time, telling the jury, as should have been done, that there was evidence tending to show that both Caples and Baer were accomplices; and that it was for the jury to determine from such evidence whether they were or were not accomplices, and if they found they were, then their testimony was of no value as corroboratory of Blum.

It is, moreover, perfectly clear, from the testimony of Baer (exception VI, Record, 45–46, also charge of court, Record, 56), and the testimony of Caples, as recited by the court (Record, 48–50), if their testimony is true, that they were both accomplices, and their testimony to be of value must be also corroborated in the manner prescribed by the statute and well-settled rule of law. Yet the court, omitting all reference to the fact that there was testimony tending to show they were accomplices, and assuming they were *not* such, told the jury, in substance and effect, that if they believed their testimony, then its effect was not only to corroborate Blum, but to connect Dunbar with the commission of the offense.

Inadvertently, the writer of this brief omitted under the proper head, as to sufficiency of the indictments in this case, to refer to the case of United States *v.* Claflin (13 Blatchford, 184), cited by the court below (Record, 19), and which will, doubtless, be relied on by the Government.

This case is relied on as an authority to sustain the sufficiency of these indictments, but while it does, I

grant, sustain the ninth count of the indictment No. 3580 (Record, 11, 12), in so far only, however, as holding that the words "smuggle" and "clandestinely introduce" (provided the merchandise is properly described) is a sufficient averment as to the illegality of the *original importation*, in an indictment for *facilitating the transportation of such article* knowing it to have been smuggled, it so far from sustaining the sufficiency of these indictments in that respect in any other of the counts on which the defendant was found guilty, is an authority against such sufficiency.

In that case, which was, in so far as the discussion by the court can have any bearing on this case, not for illegal importation, but for facilitating the transportation of merchandise, knowing it to have been illegally imported, the court simply held that in *such a* case "an indictment need not set out the offense committed in the original importation, *with the same particularity* of time, place, and circumstances that would be required in an indictment for the original offense." And hence in *such* a case an averment that the merchandise had been "*smuggled*" was held to be a sufficient averment as to the illegality of the original importation. The court said:

"In support of this objection" (that is, that the illegality in the importation in that case was not properly stated), "the proposition is advanced that an indictment for buying goods which have been brought into the United States contrary to law must set out the offense committed in the original importation, with the same particularity of time, place, and circumstances, that would be required in an indictment for the original offense. Such a proposition can not be maintained."

The court then, in the case, *supra*, 13 Blatch., passing to the consideration of the fourth count which was for illegal importation, held it insufficient, the indictment merely following the words of the statute.

The question of *scienter* was not considered in that case. All the court decided was that in as much as the 4th count of the indictment simply followed the words of the statute, it was insufficient. The court did not undertake to determine precisely what would be necessary to make it sufficient, but left a very strong inference that something more than was averred in the counts, for concealing, for facilitating the transportation and for facilitating the sale of goods illegally imported, in the 1st, 2d, and 3d counts of that indictment, was necessary, and in each of those counts the terms "*smuggling*" and "clandestinely introduced" were used.

But in any possible view of the case this authority in 13 Blatch. could only serve as an answer to the one point urged herein against the sufficiency of these indictments, that is, as to the failure to allege that the defendant *knew* the fact that the duty had not been paid, and can have no possible bearing on the other contention, namely, that they are insufficient for the reason they fail to aver that the opium was "opium *prepared for smoking*."

Assignment XXI, Exception XIII.

Point XV.

This assignment (XXI, Record, 37, Exception XIII, Record, 51) complains that there was error committed by the failure of the court to instruct the jury, as requested, as follows:

"That the court instruct the jury that they may consider the fact that those witnesses, such as the witness Nathan Blum, Garthorne, Jackling, Berg, and others, who admitted that they were associates and accomplices of the defendant, Dunbar, and who had been indicted and convicted in this court and were now witnesses for the Government, have an equitable right to a pardon which will ordinarily not be refused, and that the jury may consider that as affecting their interest."

Counsel for defendant claimed the right to have this instruction given in view of the authority of this court in the case of United States *v.* Ford, known as the Whiskey case. (99 U. S., 594.)

I am not entirely satisfied there was any error in the refusal of the court to give this charge, although considerable might be said on the subject. I submit the question to the court, with this observation.

It will be conceded that the law is well settled in this court that, while an accomplice who testifies *fully* and *fairly* as to the guilt of himself and associates in crime, is not entitled to executive clemency as a *legal* right; that he has an *equitable right* to a recommendation for pardon.

The Whiskey Cases, 99 U. S., 594.

All will agree that the controlling motive doubtless in every case of the kind that arises wherein an accomplice "turns" what is sometimes in common parlance called "State's evidence," that he does so because he sees conviction and punishment staring him in the face, and in the confident hope of evading the penalty of his crime by having his equitable right to pardon recognized by the executive. This being so, it would seem but right and proper that the jury, supposed to be unlearned in the law, should be apprised of this fact, or rather of the equitable right to clemency which attaches to an accomplice testifying under such circumstances.

Whatever view, however, the court may take of this exception, it is respectfully submitted there are in this Record numerous errors, affecting seriously the substantial rights of the accused, and by reason whereof the demands of justice and the preservation of the integrity of judicial proceedings, require a reversal of the judgment.

JOHN H. MITCHELL,
Attorney for Plaintiff in Error.

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156-185

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

WILLIAM DUNBAR, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 693.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

WILLIAM DUNBAR, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 693.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

BRIEF FOR THE UNITED STATES.

The plaintiff in error was convicted on two indictments. One (pp. 2–4) charged him in five counts with a violation of section 2865, Revised Statutes, which provides:

> If any person knowingly and willfully with intent to defraud the revenue of the United States, smuggle or clandestinely introduce into the United States, any goods, wares, or merchandise subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, or shall make out, or pass, or attempt to pass, through the customhouse any false, etc., invoice, every such person * * * his aiders and abettors shall be deemed guilty of a

misdemeanor; and on conviction thereof shall be fined in any sum not exceeding $5,000, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the court.

The other (pp. 6–12) charged him in nine counts with a violation of section 3082, Revised Statutes, which is as follows:

If any person shall fraudulently, or knowingly, import or bring into the United States, or assist in so doing, any merchandise contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment or sale of such merchandise, after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding $5,000, nor less than $50, or be imprisoned for any time not exceeding two years, or both, whenever on trial for a violation of this section the defendant is shown to have, or to have had, possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury.

He was convicted on the third and fourth counts of the first indictment, which respectively charge that on the 2d of September, 1892, he did, on the steamship *Haytien Republic*, knowingly, etc., smuggle 1,400 pounds of prepared opium, of the value of $15,400, subject to duty by law, to wit, a duty of $12 a pound. And on the 22d of February, 1893, he did, in the same manner, smuggle 900 pounds of prepared opium, subject to a duty of $12 a pound.

And on the second, fourth, fifth, and ninth counts of the second indictment, which respectively charge That on the 28th of October, 1892, he did knowingly and fraudulently import, smuggle, and bring into the United States 500 pounds of prepared opium, subject to a duty of $12 a pound, without paying or accounting for said duty or any part thereof, without having said opium invoiced, and without having the same included in the manifest of the cargo of the steamship on which it was imported, and without passing said opium through the custom-house, or submitting the same to the officers of the revenue for examination.

That on the 26th of November, 1892, he did import and smuggle into the United States 2,090 pounds of prepared opium. And that on the 5th of February, 1893, he did fraudulently and knowingly facilitate the transportation, after importation, of 200 pounds of prepared opium, subject to a duty of $12 a pound, and which should have been invoiced, which had been knowingly and fraudulently imported and smuggled into the United States, and upon which opium no duty had been paid or accounted for, according to law, and none of said opium had been invoiced—

> he, the said William Dunbar, then and there well knowing that no duty had been paid or accounted for, according to law, on said prepared opium, and that none of said prepared opium had been invoiced, and that the same, and the whole thereof, had been unlawfully, willfully, knowingly, and fraudulently brought, imported, smuggled, and clandestinely introduced into the United States, and into the district of Oregon from said foreign country, said province of British

> Columbia, in said Dominion of Canada, as aforesaid; that the said William Dunbar did then and there facilitate the transportation of such opium, after importation, by packing the same in trunks and causing the same to be transported as baggage from Portland, Oreg., to San Francisco, Cal., etc.

On the trial thirteen exceptions were taken to the rulings of the court (pp. 39–51). And the case is here on twenty-one assignments of error, which will be considered in their order in connection with the brief of counsel for plaintiff in error.

I.

> That the matters charged in the indictment under section 2865, Revised Statutes, as to the third and fourth counts thereof, and as to the matters charged in the indictment under section 3082, Revised Statutes, as to the second, fourth, and fifth counts thereof, do not constitute a crime by the common law, or under any statute of the United States.

There was no demurrer to the indictments, or to either count thereof. There was no motion to quash. There was no motion in arrest of judgment. But the attempt is made here, on behalf of the plaintiff in error, to obtain for him the benefit of one or the other of these remedies, without having "formally raised the objection in the circuit court."

In Coffey v. *The United States* (116 U. S., 441) the same attempt was made. The information on which the plaintiff in error was convicted was objected to for insufficiency, which was assigned as an error in this court. But this court refused to consider the question, becausei had not been "formally raised in the circuit court."

And in *Friedenstein* v. *United States* (125 U. S., 230), where the same question was raised, this court said:

> Under these circumstances any defect in the information, which could have been availed by demurrer or by exception, or by a motion to dismiss, at the trial made on the ground of such defect, or by a motion in arrest of judgment, must be regarded as having been waived, or as having been cured by verdict.

In the brief of plaintiff's counsel (p. 7) the ground of the alleged insufficiency of the counts is stated to be that the merchandise alleged to have been smuggled, and the transportation of which was facilitated by defendant, was "*prepared opium*," and that the smuggling of "*prepared opium*" is not an offense at common law or against any statute of the United States. It is insisted in support of this that "prepared opium" *eo nomine*, does not occur anywhere in the statutes, but that "opium prepared for smoking," or "prepared smoking opium," are the only terms employed to indicate the merchandise intended to be described in the indictment.

That the indictment does not then, in any of its counts, charge with sufficient certainty the merchandise which the defendant is alleged to have smuggled.

> It is undoubtedly true that in an indictment upon a statute it is not sufficient to set forth the defense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. (*United States* v. *Cardl*, 105 U. S., 612.)
>
> The general rule on the subject is that all the material facts and circumstances embraced in the defi-

> nition of the offense must be stated or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission can not be supplied by intendment or implication, and the charge must be made directly and not inferentially, or by way of recital. (*United States* v. *Hess*, 124 U. S., 486.)

While the offenses charged in these indictments are created by statute, yet the statutes themselves define the offense as to its subject-matter in very general terms as "goods, wares, and merchandise."

The counts, it will be observed, do not use the term "prepared opium" in any technical sense as the name by which the subject is designated in any statute, but uses the word "prepared" only to indicate the manufactured, as distinguished from the crude, opium.

The practical and important question raised is, Is the use of this term in the counts calculated to "tend to the prejudice of the defendant?" For unless it does the indictment can not be deemed insufficient. (Sec. 1025, R. S.)

The offenses charged in the indictment, and of which the defendant was convicted, were "smuggling, and facilitating smuggling." The time, place, manner, means, name of the vessel, and the subject-matter—opium—are all set forth clearly in the counts. And in addition thereto the opium is described in each count as being subject to a duty of $12 a pound. So here were two distinct features or earmarks of the opium referred to in these indictments—one, that it was "prepared opium," the other that it was opium subject to a duty of $12 per pound. These two

features characterize and designate the opium here as clearly and as unequivocally as if it had been described as "opium prepared for smoking."

That the "merchandise" which the defendant was charged with having smuggled was one particular preparation of opium, rather than another, can not tend to the injury or prejudice of the defendant unless he was not adequately admonished by the indictment of the exact offense of which he was charged; or, unless a judgment of acquittal or conviction on this indictment would not avail him as a plea in bar to another prosecution for the same offense on another indictment.

In *United States* v. *Claflin* (13 Blatch., 178, 187) the language used to identify the goods which the defendant there was charged with having smuggled, was—

> Certain goods, wares, and merchandise, to wit: Six cases containing silk goods of the value of $30,000. A more particular description of which is to the jurors unknown.

The court in that case said:

> Plainly the language used shows the subject of the transaction to be within the scope of the statute creating the offense. For the statute in terms includes all kinds of merchandise. It is also clear that the description in the indictment, together with such evidence as a trial must necessarily furnish, will fully protect in any future prosecution for the same offense. It is not necessary to describe property with such particularity as will obviate all necessity for proof outside the record to support a plea of once in jeopardy. The requisite notice of the offense charged is also to be found in the language used. The rule requiring notice of the offense charged is never so

> applied as to compel a description calculated to be fatal to the prosecution. A reasonable amount of detail in description is all that can be demanded for the purpose of informing the defendant. If, in any case, such reasonable detail prove insufficient to enable the defendant to prepare his defense, all possibility of injustice is removed by a bill of particulars, to which the defendant is entitled, upon making oath, that further particulars are necessary to enable him to defend.

Here the defendant certainly knew that the merchandise which he was charged with having smuggled was opium. He saw, too, that the only description which the counts afforded him, of the particular kind of opium referred to, was that it was "prepared opium," charged with the duty of $12 a pound.

If he really was at a loss to know exactly what was referred to by that term, he should either have demurred to the indictment, or called for a bill of particulars, or proceeded by a motion in arrest of the judgment. But when, instead of doing any of these things, he met the charge as made in the indictments, only by a general plea of "not guilty," he there plainly declared that he well understood with what offense the indictments charged him and that he was not guilty as charged.

It would seem to be of no sort of consequence what the opium was prepared for, whether for smoking or something else, or whether the preparation was a liquid or a solid. The statute forbids the consideration of mere defects of form, and prescribes as the final and essential test that the insufficiency of the count shall be such as to tend to the prejudice of the defendant. By that test we are willing that these indictments may be tried.

II.

> The indictments are insufficient in failing to aver that the defendant *knew* that the alleged duty on the opium had not been paid.

This can not certainly be said of the ninth count, which avers that "he, the said William Dunbar, then and there well knowing that no duty had been paid or accounted for according to law," etc.

But what is true of the ninth count is equally true of each of the other counts of the indictments.

The two statutes, sections 2865 and 3082, Revised Statutes, each begin "if any person *knowingly* and willfully," etc., and section 3082, referring to a person facilitating the transportation, etc., of merchandise "*knowing* the same to have been imported contrary to law."

Now, it will be observed that every count charges the defendant with "willfully, unlawfully, fraudulently, and *knowingly*" smuggling opium, etc.

> "Knowingly," as used in the statutes, refers to the guilty knowledge of the owner, consignee, or agent by whom the entry is made or attempted. (*Cliquot's Champagne*, 3 Wall., 144.)
>
> The word "knowingly," or "well knowing," will supply the place of a positive averment that the defendant knew the fact subsequently stated. (1 *Bish. Crim. Proc.*, 3d ed., sec. 504.)

So that no room for cavil or hypercriticism remains. The counts of the indictments by the use of the term "knowingly" charge the defendant with a guilty knowledge of every fact alleged in the count as fully and as dis-

tinctly as though a charge of such knowledge was coupled with every allegation of fact that was made.

All of the text writers, courts, and the precedents of pleading are in accord with the statement of Mr. Bishop.

On pages 76 and 77 of brief of plaintiff in error the objection urged in the court below to the sufficiency of the count on the ground of the use of the word "smuggle," appears to be waived, or rather shifted.

The case of *United States* v. *Claflin* (13 Batch., 178), is conclusive as to the significance and legal import of the term "smuggle."

III.

Point III, page 44 of plaintiff's brief, is covered by the second assignment of error (p. 23 Rec.). That and the third assignment of error (pp. 23, 24 Rec.) relate to the weight and sufficiency of the evidence on which this conviction was had.

It is enough to say, in reply to this and to all similar questions raised upon these assignments of error, that it is impossible for this court, in this review of the case, to pass upon any such question, because this record does not disclose upon what evidence the plaintiff in error was convicted. The evidence which was heard in the court below has not been brought up here by any certificate of the judge who presided at that trial. Certain detached fragments of testimony of witnesses do appear here, but only with sufficient fullness and for the sole purpose of showing the relevancy or irrelevancy of tertimony objected to and admitted or excluded.

IV and V.

That the court erred in admitting testimony of the witness, Nathan Blum, as to the contents of letters written by him to the defendant.

It seems that no previous notice had been given the defendant to produce these letters. The witness stated that all these letters, of which he was testifying, were upon the subject of this opium, and that "they were all copied in our letter books, belonging to the Merchants' Steamship Company; they are all in the possession of Mr. Dunbar."

Notice was then at the bar given to counsel for the defendant to produce these letters and the letterpress copies.

Whereupon counsel for the defendant, not objecting to such notice on any ground, replied: "We have no such letters and never have had."

Here was the fullest and amplest waiver of the notice, its sufficiency, either as to time, form, or substance. By the denial that there ever were any such letters as the witness had testified he had written, the defendant declared that any notice to him at any time to produce such letters would have been unavailing and, therefore, unnecessary.

The object of requiring the production of the letters themselves, instead of accepting the witnesses' testimony as to their contents, was in deference to the rule which requires the production of the "best" evidence; and not until that is shown to have been lost can secondary evidence be admitted. But here what seemed to be secondary

evidence becomes the best evidence by reason of the defendant's denial that the original letters ever existed at all.

Whether the witness Blum was a "self-confessed conspirator and accomplice" or not can not affect the question of the admissibility of his evidence, however strongly it might bear upon his credibility, of which the jury alone were the judges.

VII.

The witness Blum testified that the opium was not invoiced, and that no duty was paid on it, and it was not submitted to the custom-house officers for inspection. Defendant, by counsel, objected to this testimony, and moved that it be stricken out "because it is not the evidence that the law requires, as the witness can know nothing about it."

Just how it appeared in the court below that the witness could know nothing of the things as to which he testified so distinctly and positively, we can not ascertain from this record. There certainly is nothing here to show what the opportunities of the witness were and what his sources of knowledge. He stood before a jury in the court below, exposed to their scrutiny and subjected to the searching cross-examination of defendant's counsel. Surely it is going somewhat too far to ask this court to declare the rulings of the court below to be erroneous—and for that cause to reverse its judgment—when the light that surrounded the lower court is not permitted to shine through the pages of this record.

VII.

That the court erred in admitting testimony as to the contents of a telegram alleged to have been received by the said witness Blum from the defendant, and found in the testimony of said witness Blum.

Upon the objection to this and other telegrams, the witness in reply to questions said that the telegrams themselves and their subject-matter were subsequently talked about by the defendant Dunbar and himself, and that Dunbar admitted that he had sent the telegrams to him and had received his replies (see pp. 27–29 Rec.).

Here, again, the production of the telegrams as the best evidence, or the failure to produce them, might have been required had not Dunbar himself subsequently admitted the fact of the telegrams and their subject to the witness. The whole matter became then simply a question of Dunbar's admission.

One is sued in debt for a sum of money. In support of his plea of payment he testifies to having had the written receipt of the plaintiff for the full amount. If he relies on that written receipt alone he must produce it, or satisfactorily account for his failure to produce it. But suppose he produces a witness who testifies that the plaintiff had admitted to him that he had given to the defendant a receipt in full for the whole amount sued for. That admission takes the place of the receipt, and so here.

VIII.

This, too, is to the admission of a telegram, and is really connected with the next preceding assignment, VII.

IX

is waived (p. 57, Brief).

XI.

In admitting the testimony of the witness, Sigmund Baer, as to the proceeds of the sale of opium (pp. 30–31 and 45, Rec.; 59, Brief), the witness stated (p. 45, Rec) that the proceeds of the opium were left for collection in San Francisco; that he collected $1,295 and applied $1,077.75 to taking up a note of Mr. Dunbar's in the Pacific Bank.

The defendants objected to this on the ground that the Government should produce the note as the best evidence. Well, the note, if produced, would not have been the best evidence of its payment. The best evidence of a payment in the absence of a contemporaneous written acknowledgment is the testimony of the parties to that transaction.

But, at last, all these objections go to the weight of the evidence and not its admissibility; they were for the jury and not the court.

XII.

This relates to assignment XX. (Rec. 36; Brief, p. 61.)

This objection is to so much of the charge of the court to the jury as tells them that if they believe the testimony of Sigmund Baer that that would be inconsistent with innocence on the part of Dunbar of this transportation, and the tendency would be to connect Dunbar with it.

The ground of objection, as appears from the brief of counsel, is that in this charge the judge trenched somewhat on the province of the jury.

A court of the United States, in submitting a case to the jury, may, at its discretion, express its opinion upon the facts; and such an opinion is not reviewable on error, so long as no rule of law is incorrectly stated; and all matters of fact are ultimately submitted to the determination of the jury. (*Lovejoy* v. *The United States*, 128 U. S., 171; *Rucker* v. *Wheeler*, 127 U. S., 85; *Starr* v. *The United States*, 153 U. S., 624.)

The court conforms its instructions to the jury to the tendency of the evidence. It does not assume to determine what the evidence before the jury in fact proves, but what it tends to prove.

The jury heard the testimony of the witness Baer and of the defendant Dunbar. It was not for the court to say which of these as witnesses was to be believed or relied on; that was for the jury to determine. And accordingly the court in the portion of the charge objected to only told the jury in substance—if you believe Baer, the tendency is to connect Dunbar with the matter; if you believe Dunbar, he had no connection with it.

XVI and XVII

are waived (plaintiff's brief, p. 66).

ASSIGNMENTS XIV AND XV EXCEPTIONS VII AND VIII.

(Pp. 54–65 plaintiff's Brief, 46–47 Rec.), are not argued on the plaintiff's brief; but it does appear that the court,

in its charge to the jury (p. 53), referred to evidence that had been admitted, as follows:

> Evidence of the bad character for truth of the witnesses Blum and Garthorn, and of their bad moral character as affecting their veracity, has been received and is proper for your consideration in determining the weight to be given to the testimony of these witnesses. Their reputations may be bad in this respect; and yet they may have told the truth in their testimony. You should receive the testimony of a witness who is thus impeached with caution, and it may justify you in discrediting them altogether.

XVIII.

This relates to so much of the charge of the court as defines a "reasonable doubt."

We are unable to discover any safe ground for criticism of the views expressed by the court.

It happens most frequently, in these attempts of judges at epigrammatic definition, that in laboring to be brief they become obscure.

XIX.

As to the testimony of accomplices, the court, in its charge to the jury (p. 53), said:

> And so with reference to the testimony of accomplices in the alleged crime. Such testimony, in so far as it is not corroborated, should not be allowed to convict; and I instruct you not to convict the defendant upon any count in either of these indictments upon the uncorroborated testimony of accomplices. You are not to suppose that accomplices are incompetent witnesses; you should not disregard their testimony because they are accomplices.

If the plaintiff in error is an innocent man, and, as alleged here, the victim of a verdict induced by erroneous rulings of a judge in the course of a trial, he has done himself great injustice in not exhibiting in this record all the evidence which was adduced upon the trial, to the end that it might appear to this court of review that the evidence on the whole case exhibited his innocence; and that only evidence improperly admitted, or inaccurate deliverances by the court to the jury, had defeated the ends of justice.

As the case now stands, the grounds relied on to support the assignments of error are quite too microscopic in extent and too nebulous in substance, and depend too entirely upon the flatteries of hope for their strength and stability to afford the plaintiff in error a longer respite than the time that may be required to examine this record and prepare the opinion affirming the judgment of the court below.

HOLMES CONRAD,
Assistant Attorney-General.

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Office Supreme Court, U. S.
FILED.
JAN 23 1895
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156-185

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

WILLIAM DUNBAR, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 693.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

Since this case was submitted my attention has been directed to a decision of the circuit court for the northern district of New York, in which it was held that—

> An indictment which describes the merchandise smuggled and concealed as "smoking opium" or "prepared opium" describes it sufficiently to denote that the merchandise was within the classification of "dutiable merchandise." (*United States* v. *Gardner*, 42 Fed. Rep., 832.)

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"All other *preparations* of opium *not specially enumerated or prescribed for.*"

Consequently, it might under that act, with some propriety, have been said that the averment, "smoking opium," or "prepared opium," was a sufficient designation of the "dutiable merchandise" alleged to have been smuggled. It is quite different under the revenue act of 1890. Under that act only *two* kinds of prepared opium *not* liquid were subject to duty, namely:

1st. Opium containing less than nine per cent of morphia, and,

2d. Opium *prepared for smoking*. While the general clause, "all other preparations of opium not specially enumerated or prescribed for," *contained in the act of 1883*, is omitted in the act of 1890. There being, therefore, several kinds of *prepared opium* not dutiable at all under the act of 1890, it is clear an averment of simply "*prepared opium*," omitting to aver it was *prepared for smoking* or was smoking opium, is insufficient.

This point was brought to the attention of the court in my former brief, pages 13, 14, 15.

Respectfully submitted.

JOHN H. MITCHELL,
Attorney for Plaintiff in Error.

156-185

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Supreme Court of the United States.

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WILLIAM DUNBAR, Plaintiff in Error,
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THE UNITED STATES.
No. 693.

156-185

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

Brief of Plaintiff in Error in Response to Supplemental Brief of the Assistant Attorney General, Filed January 23, 1895.

The opinion cited (case of United States *v.* Gardner, 42 Fed. Rep., 832) can have no possible bearing on the case at bar, even were it conceded to be good law, for this reason:

1st. That was an indictment for smuggling opium prepared for smoking, under the revenue act of 1883. By that act every possible preparation of opium was subjected to a duty of $10 per pound. That act, after specifying certain kinds of opium, has this general clause:

"All other *preparations* of opium *not specially enumerated or prescribed for.*"

Consequently, it might under that act, with some pro-